

Chapter 28: The Decision-Makers

For the most part, growth is regulated at the local level by the borough, town, city, or county government. A number of projects also require a permit or other approvals from state and federal agencies. There are a number of individual government officials and bodies (commissions, boards, etc.) who participate in determining whether various permits-approvals will be issued. Some make a recommendation while others render a decision which can then be appealed to another official or body. Collectively, I refer to both individual officials and bodies as *decision-makers*. The owner of property which has or could be proposed for development is, of course, another decision-maker. In addition there may be a development company which has an agreement to purchase the property from the owner if certain conditions are met. The development company is also a key decision-maker in determining what gets built on a site.

Throughout this book I will use the phrase *final decision-maker* to refer to that body or individual whose determines if a permit or approval will be granted. While there are usually a number of officials who influence decision-making there is one body who makes the final decision. Those aggrieved by this decision can then appeal, but the question becomes:

Did the final decision-maker adhere to applicable legal requirements?

The final growth management decision-maker at the local level is usually the planning board, at least for individual development projects. In some local jurisdictions the planning director or a hearing officer may serve as the final decision-maker on individual projects. The local legislative body is usually the final decision-maker on a comprehensive plan, an amendment to the plan, the zoning applied to individual properties, changes to zoning regulations, and other development-related legislative actions.

For most projects, the decision-making process begins with staff who review applicant submittals to determine compliance with applicable laws and policies. Staff report their findings to the head of their agency who then forwards findings and a recommendation to a final decision-maker, which is usually the local planning commission. The commission's decision may then be appealed to a local Board of Adjustments/Appeals or directly to the courts. The courts frequently do not hear any new evidence but instead review the record created at the hearing planning commission held on the project. Following is detail on each of the decision-makers.

PROPERTY OWNER

The owner of a potential or proposed development site may be an individual, a couple, a family, a corporation, etc. For advice on identifying the owner see *Determines Who Owns The Property* in Chapter 16 and *How To Obtain A Deed* in Chapter 19.

In areas with a hot housing market the owners of farms and other large tracts of developable land may be under considerable pressure to sell. Frequently, these owners have a desire to preserve their

property from development but rising property taxes, increasing difficulty in operating the farm, the need to get equity from the land for retirement or college tuition, all combine to make preservation very difficult. As explained in Chapter 16, under the heading *Preserving A Potential Development Site*, there are a number of options which may allow the owner to get substantial equity from the land while retaining the use and even ownership.

Its okay to contact an owner about their interest in preserving their property through easements and other mechanisms. But if you learn that the owner has a contract to sell their property to a development company or someone else, then ***stop the conversation immediately***. Other wise, you could be exposed to a lawsuit for tortuous interference, particularly if the owner subsequently breaks the contract.

DEVELOPMENT COMPANY

The company proposing to develop a site may own the property or the company may have a contract to purchase with the property owner. The contract will set a fixed or contingent price if certain milestones are reached in the permitting process. For example, the contract may state that if the proposal to develop the site receives preliminary plan approval then the sale will occur. The purchase price may be contingent upon the number of housing units or other development units which are approved. Generally, the contract is not recorded so those other than the parties to the agreement will have great difficulty obtaining the contract. I urge you not to even try. As stated above, do not do anything which could be construed as an attempt to interfere with a contract between a property owner and development company. This is one of the very few circumstances under which a citizen can be successfully sued in a development case. However, I strongly encourage you to contact the development company to negotiate a resolution of your concerns. Detailed advice on this topic is provided in *Chapter 37: Negotiate With The Applicant*.

STAFF

Most local jurisdictions have at least one staff member with expertise in planning and zoning. In the smallest jurisdiction staff may consist of a planner on contract who is consulted as needed. In other areas the local jurisdiction may rely upon planning staff assigned to a region who serve a number of towns or counties. Additionally, a Town engineer or public works staff will review a project for issues such as stormwater management, traffic and adequacy of public water and sewer services. Staff at the Board of Education may evaluate the adequacy of schools to serve the students generated by residential development projects. Health officials will review proposed well and septic systems. In rapidly developing jurisdictions, dozens of staff people may review and comment on specific aspects of each project.

PLANNING BOARD-COMMISSION

Most local jurisdictions have a planning board or a planning commission which considers everything from the comprehensive plan to plan amendments to new laws to zoning changes to specific development projects. Usually the planning board or commission is composed of individuals selected for their ability to represent community views and for their expertise. The best Boards are composed of individuals representing the diversity of views within the community. In other words, the Board

is balanced by those with backgrounds in economics, real estate, environmental management, school administration, and so forth as well as people who are parents, business owners, employees, etc.

Planning Board members are the unsung heroes of the growth management process. They are nearly always volunteers who donate their time attending meetings, reviewing issues at home, and educating themselves about how to manage growth more effectively.

Usually, Planning Board members are appointed by the local legislative body to serve for a specific number of years. Every year a portion of the Board members may be up for reappointment.

Frequently, the Planning Board is the final decision-maker on development projects. By *final decision-maker* I mean that the Board's decision is the final word for most development projects. While the courts may consider an appeal of a project approval, most jurisdictions obligate judges to presume that the Board's decision was correct.

The Board is responsible for ensuring that a project meets each of the specific zoning, subdivision, and other development regulations applicable to the project. Additionally, most local regulations require the Board to consider the cumulative effect of a project on public health, safety, or welfare, which is another way of saying the quality of life of nearby residents as well as the entire community. This is a responsibility which the board shares with no other decision-maker, save the applicant.

The role of the Planning Board varies from state to state and even locality to locality. In some jurisdictions the Planning Board may only make a recommendation on development projects with the local legislative body serving as the final decision-maker. In other jurisdictions a hearing officer or planning director may serve as the final decision-maker.

An appeal of a Planning Board decision may be heard by a hearing officer, a Board of Appeals, the local legislative body, or the courts.

I have had the opportunity to observe many Planning Boards across the nation. The best Boards are those which give citizens a clear sense that their concerns have been heard, fully considered, and that the Board has genuinely sought to resolve each concern falling within their purview. In other words, the best Boards respond every time a citizen raises a new concern. The response may be to explain why the concern is outside the Board's jurisdiction or to ask questions of the applicant or staff. These questions are designed to first verify the concern and then to seek a solution if the concern is found valid.

It has been my experience that when a Board operates in the manner described above we tend to get far more of the benefits of growth, with fewer negative consequences. And even when a Board makes a decision counter to that advocated by citizens, people come away from the hearing feeling they were treated fairly. I suspect that far fewer Board decisions are appealed when citizens feel they were heard and fairly treated. In contrast, our clients invariably seek an appeal when a Board asks no questions and dismisses citizens concerns with little or no deliberation.

It is far easier for a Planning Board to operate in the preferred manner presented above if we citizens do our part by:

- not repeating concerns expressed by others;
- making an attempt to understand the issues the Board can and cannot consider by talking with staff before the hearing date;
- suggesting possible solutions (preferably win-win); and
- presenting concerns succinctly.

Further advice on presenting testimony is provided in *Chapter 40: Legal Action*.

OTHER BOARDS & COMMISSIONS

Many local jurisdictions have a decision-making body known variously as the Board of Appeals, Board of Zoning Appeals, or Board of Adjustments. Generally, these Boards have the authority to hear an appeal of a decision by the Planning Commission and sometimes any land-use related decision made by any local official. The Board may also be the primary decision-maker on specific permits-approvals such as variances, special exceptions, conditional use permits, or special use permits. Those aggrieved by a decision of the Board may take an appeal to the local legislative body or to the trial court

A number of states allow for the creation of boards or commissions focused on specific aspects of growth management, such as wetland protection, environmental issues in general, preservation of historic and other cultural resources, etc. Frequently, these boards serve in an advisory role to the planning commission. In other words, they make a recommendation which the planning commission is free to endorse or reject.

HEARING OFFICER

In some localities a hearing officer or examiner serves in the role normally played by a planning commission or a Board of Appeals.²¹⁰ The hearing officer, who is usually an attorney, acts as an administrative law judge. A semi-formal legal proceeding may be convened before the hearing officer with attorneys representing: the applicant, citizens concerned about the project, and the local government.

The focus of the hearing is usually a plan detailing the proposed development project. The hearing officer must determine whether the plan conforms to all applicable laws, regulations, and policies. If it does, then the hearing officer formally approves the plan. The approval may take the form of a written decision. The hearing officer may also have the option of adding conditions to an approval

²¹⁰ For example of two jurisdictions (Baltimore Co., MD and King Co., WA) with hearing officers visit: http://www.baltimorecountyonline.info/Agencies/planning/welcome/zoning_commissioner.html or <http://www.metrokc.gov/mkcc/HearingExaminer/index.htm>

when needed to achieve full compliance. And, of course, the hearing officer can deny approval altogether.

The hearing may begin with a presentation by staff as to what has been proposed along with their recommendations: approve, approve with conditions, or deny. The applicant's attorney then presents legal arguments along with facts and expert opinion through witnesses in hopes of demonstrating that all requirements have been met. The attorneys representing citizens and local government can cross-examine the applicant's witnesses. It is then the turn of the citizen's attorney to put on their case. After cross-examining witnesses who testify on behalf of the citizens, the applicant's attorney and local government may get the last word by through rebuttal testimony. An appeal of the hearing officer's decision may go to a local Board of Appeals, the local legislative body, or to the courts.

LOCAL LEGISLATIVE BODY

The local legislative body may be known as a town or borough council, county commissioners, selectmen, board of supervisors, and various other titles. The local legislative body is responsible for enacting the laws setting forth how growth is managed. These laws must be consistent with State statutes as well as federal laws, including the U.S. Constitution.

The local legislative body is usually the final decision-maker on the comprehensive plan, amendments to the plan, and the zoning applied to each parcel of land within the jurisdiction. The local legislative body appoints members of the Planning Board and Board of Appeals or may hear appeals of the decisions made by the Planning Board or other units of government.

Like Planning Board members, most of those serving on local legislative bodies receive little or no compensation.²¹¹ Thus they also contribute many long hours towards the betterment of their community and deserve the respect and gratitude of us all.

The best local legislative bodies, like Planning Boards, are composed of people representing the diversity of views within the community and strive to fully hear and consider the concerns expressed by citizens. Few units of government have as much effect on our quality of life as local legislative bodies. Their decisions in large part determine the degree of congestion on our roads, the quality of our schools, and the healthfulness of our environment. Yet it amazing how few of us attend meetings held by our town council or county commissioners or provide input via a phone call, e-mail, or a letter.

Many local legislative bodies now post their meeting dates and agendas on the internet and publish this same information in local newspapers. If you are concerned about how growth is managed in

²¹¹ See *Two Decades of Continuity and Change in American City Councils*. Commissioned by the National League of Cities, September, 2003. <http://www.nlc.org/content/Files/RMPcitycouncilrpt.pdf>

your area, then I urge you to monitor these announcements for relevant issues and then provide your thoughts.

MAYOR, COUNTY EXECUTIVE, OR MANAGER

Many local jurisdictions have a chief executive officer who is responsible for overseeing the various agencies that carry out the work of government. If elected, this chief officer is known as a mayor in municipalities (towns and cities) or as a county executive. If appointed by the local legislative body then the chief executive officer may have the title of town manager, city manager, or county manager.

The authority of the chief executive varies from jurisdiction to jurisdiction. The mayor of a large city or the executive of a densely populated county usually wields enormous power, including the right to veto actions of the local legislative body. A small town mayor may function more as an additional member of the local legislative body with no veto power and some limited authority beyond this role. A town or city manager is usually appointed to office by the local legislative body. Like any other appointed agency head, the manager serves at the pleasure of the local legislature and may be fired at any time.

A strong mayor or county executive may function as the true decision-maker for many aspects of how growth is managed. Since they oversee the planning department and other agencies, the mayor or county executive exerts considerable control over the recommendations these agencies make to the local legislative body, the planning commission, and other decision-makers. Even a weak mayor or town-city manager can influence land-use decision-making. So do not overlook the chief executive of your locality when exploring options for resolving your concerns.

STATE & FEDERAL GOVERNMENT

Regional, state and federal agencies can also influence how and where development goes. In more populated areas a Metropolitan Planning Organization (MPO) decides how and where transportation funds will be spent. By deciding where new roads go an MPO can play a major role in determining the pattern of future growth and whether existing developed areas will thrive or decline. State agencies are frequently responsible for issuing a variety of environmental permits/approvals and for distributing funds for the construction of schools, roads, water and sewer facilities, and other infrastructure. State agencies may also develop a number of the guidance documents used by local officials in determining whether specific permits/approvals should be granted. Federal agencies may be involved in project-specific decision-making, such as the permits issued by the U.S. Army Corps of Engineers for impacts to wetlands, streams or other *waters of the United States*.

For the most part, once local government decides that a project is acceptable on a specific tract of land regional, state and federal agencies are very reluctant to take actions which would stop the project. They may add conditions to a permit to reduce project impacts, but rarely will the conditions rise to the level of stopping a project.

COURTS

In most states there are three levels of courts which may hear a land use case. The first court encountered when an appeal is taken of a decision by a Board of Appeals, a local legislative body,

or a planning commission is the trial court known variously as circuit court, superior court, or by other names. Those aggrieved by a trial court decision may then go to a Court of Appeals, Court of Special Appeals, or a mid-level appellate court known by some other name. The mid-level court decision may then be appealed to a state supreme court. But like the U.S. Supreme Court, the state supreme courts may only hear the cases they select. Frequently, appeals of land use decisions stop at the mid-level appellate court. It can take two- or three-years from the time a case is appealed to the trial court until a final decision is issued by the mid-level appellate court.

While the first level may be called the trial court, frequently these courts only look at the record established in a lower level proceeding. For example, if you take an appeal of a Board of Adjustment decision, the trial court judge may only consider the facts presented before the Board and whether the decision of the Board conformed with applicable law. In this case, new evidence cannot be introduced before the trial court judge. For better or worse, you are stuck with the record made at the lower level.