

Chapter 41: Changing the Law

If previous strategy approaches are not working then a change of law may be worth consideration, especially if the applicant has absolutely refused to negotiate and staff/decision-makers are sympathetic but they contend that existing law does not provide the authority to resolve your concerns. Once you identify a change in law that will resolve your concerns, use the guidance in this chapter as well as that in Chapters 36 and 39 to lobby the appropriate legislative body to enact the new law. If your hope is that the new law will apply to a proposed development project, then you are racing against a clock. So, as I said in the Secrets of Success, *hustle, hustle, hustle*.

BASIC OPTIONS FOR CHANGING THE LAW

There are five basic options for changing the law:

- A. Convince the local legislative body to adopt zoning;
- B. Change the zoning applied to a development site to another zoning district in which allowed uses are more compatible with your quality of life;
- C. Changes the uses permitted within a zoning district to limit incompatible uses;
- D. Change the performance standards in the zoning ordinance to require more effective quality of life protection measures;
- E. Change other local, state, or federal laws to require more effective quality of life protection measures.

Adoption of Zoning

There remains a number of local jurisdictions in the United States which have not adopted zoning as a means to gain the benefits of growth while minimizing adverse effects. If this is true of your locality, then consider calling for the adoption of zoning, though this may not happen quickly enough to affect a proposed development project.

A town, city, or county derives the authority to adopt planning and zoning laws through state enabling legislation. A number of state enabling laws require a local jurisdiction to go through a lengthy study process leading to the adoption of a comprehensive plan then a zoning ordinance designed to implement the goals and objectives of the plan. If this is the true of your state, then the process may move too slowly to affect a proposed development project. But if your state allows for the imposition of a building moratorium during the study-adoption process, then this approach may be appropriate for your situation.

If you are concerned about lands that are not the subject of a development proposal, then winning the adoption of zoning may be a viable option for ensuring that the use of these lands remains compatible with your quality of life.

In localities lacking zoning proposed development projects must still conform to county, state, and federal laws. These laws usually require compliance with building codes, well and septic system regulations, and wetland protection requirements, to name a few. If your area lacks zoning consider whether changing these laws is a way of resolving your concerns.

Zoning Change

In most localities there are two processes for adjusting the zoning applied to each parcel of land: comprehensive rezoning and spot zoning.

Comprehensive Rezoning: This process is initially employed when the jurisdiction adopts a master plan and zoning ordinance. The master plan sets forth the collective vision of how voters wish their area to grow. In broad strokes the plan shows where industrial uses should go as well as retail commercial, residential, and institutional uses. Each parcel of land within each general use area is then assigned to zoning districts intended to maximize the benefits of new development while buffering existing and adjoining uses from negative effects.

A number of local jurisdictions will periodically examine whether conditions have changed sufficiently to warrant a change in zoning. This process takes place every ten- to fifteen-years when the master or comprehensive plan is thoroughly reviewed then revised to reflect current conditions. It may also occur, say, every two- to four-years in between master plan updates. During these interim updates property owners, planning staff, and members of the local legislative body have the opportunity to propose rezoning of particular parcels of land. In a number of localities anyone can propose a rezoning either directly or through their representative on the local legislative body.

The criteria for granting-denying a rezoning request vary from jurisdiction to jurisdiction, but generally come down to:

- Was the original zoning applied mistakenly?
- Have conditions changed sufficiently in the vicinity of the subject parcel(s) that the original zoning is no longer appropriate?
- Will the proposed zoning be consistent with the purposes of the master plan and zoning ordinance?

The rezoning process and criteria will usually be found in the local zoning ordinance, the charter for your town, city, or county, or in the statute enabling local planning and zoning in your state.

Spot Zoning: A change in the zoning applied to a specific lot or parcel is known as *spot zoning*. Generally, spot zoning is illegal because it tends to be arbitrary in the parcels it is applied to, capricious in that it circumvents the comprehensive planning process, and unreasonable in that it applies to a very small area. However, courts have upheld spot zoning if the proponents can demonstrate that the three criteria given above are met.

Actions in addition to a rezoning have been overturned by courts because they are, in effect, spot zoning, but fail to meet the three criteria above. These actions include: zoning text amendments, special exceptions, conditional use permits, special use permits, and variances. If the action is clearly arbitrary, capricious, and unreasonable (as defined above) then it may be overturned as spot zoning.

Permitted Uses

Most zoning ordinances contain a list of uses that are permitted within each zoning district:

- by-right;
- by special exception, conditional use permit, or special use permit; and
- as accessory uses.

By-right uses are those that can be approved without a hearing focusing on the appropriateness of the use for the proposed development site. By-right uses are usually compatible with all other activities permitted in the zone, provided various performance standards are met.

A hearing on the site-specific appropriateness of the use is required for activities permitted by special exception, conditional use permit, or special use permit. If the final decision-maker determines that the impact of the use would be significantly greater on the proposed site than most other similarly zoned properties, then a denial is in order.

Accessory uses normally have a very minor effect on neighboring property owners. Typical accessory uses might include a tool shed, a sign, underground cables, etc.

If your local zoning ordinance permits uses by-right within a zone and the use can be incompatible with other by-right uses, then a change is warranted. Consider calling for a zoning text amendment that either deletes the use completely from the zoning district or changes it to one requiring a special exception, conditional use permit, or special use permit.

Performance Standards

Performance standards are limits on the intensity of use or how and where the use may be constructed within a site. Performance standards also include measures to minimize adverse effects. Following are examples of some of the many performance standards in use around the country:

- limits on the number of residential units per acre;

- the percentage of a site that may be covered by commercial, institutional, or industrial uses;
- building setbacks from property lines;
- building height restrictions;
- lighting requirements;
- visual and noise buffering requirements; or
- various environmental protection measures such as stream-wetland buffers, erosion and sediment control, well-septic regulations, and stormwater management requirements.

Most performance standards will be contained within the zoning ordinance but may appear in subdivision or development regulations. If existing performance standards are inadequate to resolve the impact of a proposed development project, then consider calling for a change of law to improve the standard or to adopt a new one. But first make certain you have thoroughly exhausted your efforts to get decision-makers to impose the standard as a condition of approval. Winning a condition is far less difficult when compared to changing a law.

Changing Other Local, State or Federal Laws

Frequently a development project must conform not only to laws of the town where the site is located, but those administered by a county, state, or federal agency as well. For example, in rural areas if new homes are proposed for construction within a town and will be served by a well and septic system then the county health department may be the approving authority. If a project will include a new wastewater treatment plant then the developer may need an NPDES discharge permit from the state pollution control agency. The U.S. Army Corps of Engineers is commonly involved in regulating wetland impacts.

If local decision-makers claim they lack the authority to enact a law resolving your concerns, then research whether another local unit of government or a state-federal agency has the necessary authority. Usually, local planning and zoning officials can tell you which agency, if any, administers the area of law pertaining to your concern. Our clients have won a number of cases where local government refused to amend their laws but we succeeded in getting the state legislature to enact the necessary change. Generally, it is more difficult to change state law compared to local, but circumstances sometimes favor this approach.

HOW TO FIND THE BEST WORDING FOR A NEW LAW

Once have concluded that decision-makers lack the authority to address your concerns, the next question becomes:

How do you draft the wording for a bill²³⁰ that changes existing law in a way that grants decision-makers with the power to resolve your concerns?

Many ideas for possible bill content will be found in Part I of this book. Just go to the chapter specific to your concerns. Additionally, if local planning and zoning officials are cooperative then they can certainly suggest language for the bill. Veteran legislators endlessly amaze me with the superior bill language they come up with compared to what I would have proposed. If neither approach works then try looking around at other jurisdictions in your state.

Is there another borough, town, or county that has a law on their books which would resolve the impacts of concern to you? If there is then changing the law just became a bit easier. This approach has an added advantage. Decision-makers prefer not to be the first to adopt a new, never-tried-before law. If you can point to another jurisdiction which has a law in place similar to the one you are advocating, then local decision-makers will embrace it more readily. Rather than speculating about the impact of the law - what it will and will not do, undesirable side effects, unforeseen costs - your decision-makers can look at how well it actually works in the other jurisdiction where it is already in effect. More importantly, you can do the same and verify that it truly resolves your concerns.

How do you determine if another jurisdiction has a law which would resolve your concerns? Contact citizen groups active throughout your state, such as the Sierra Club, League of Women Voters, historic preservation organizations, etc. To find these groups go to the [CEDS website](#), click on the *State By State Resources* button, then scroll down to your state.

State agencies may also be of help, particularly if there is a land use planning agency at the state level. If your issue is traffic-related then contact the state highway or transportation agency. For environmental issues contact the state natural resources, conservation or environment department. In most states there are also a few jurisdictions widely regarded as having the most progressive laws. The planning staff in these jurisdictions might know of a law on their books which would resolve your concerns if adopted by your local decision-makers.

If you find a law which seems workable then make certain it truly will resolve your concerns. Talk to the staff and citizen activists in the jurisdiction where the law is already in place. Describe your situation, your concerns, and where your project stands in the review process. Ask staff or citizen activists their opinion about how well the law would resolve your concerns if adopted by your local government. Have your attorney review the law also.

Following are some factors which might negate the impact of a new law.

²³⁰ A proposed law is usually called a *bill*.

Grandfathering: New land-use laws commonly include a clause exempting projects which have reached a specific milestone in the development review process. For example, projects which have received subdivision plan approval may be exempted. This practice is known as *grandfathering*.

Generally, the local legislative body is not required to include a grandfathering clause in new laws. Nevertheless, it is common practice to include grandfathering language. So, take a careful look at any new law you are considering to see if it has a grandfathering clause. If it does, then will the clause exempt the project of concern to you? If it will then you need to lobby for an amendment.

Vested Rights: If you are seeking to resolve your concerns through a change in law, then it is critical that the law take effect before an applicant's rights to proceed with the project become *vested*. If vesting occurs before the effective date, then the new law has no effect on the project.

In a number of states, an applicant's right to develop a site does not become vested until all required permits-approvals have been granted and significant construction has occurred. In my home state *significant construction* is defined as at least having building footers in the ground.

Primacy & Preemption: Sometimes a new law is overturned by the courts because another unit of government has established primacy with respect to the activity regulated by the new law. For example, in the early 1990s citizens in my home state were faced with an epidemic of construction and demolition debris landfills (aka rubble dumps). We sought to halt the proliferation by getting local governments to adopt new laws requiring liners, leachate collection systems, and other water quality protection measures. But the appellate courts overturned these local laws ruling that state landfill laws and programs were so comprehensive in protecting water quality as to *preempt* the right of local government in this area. However, the courts have upheld local landfill laws pertaining to issues traditionally under the purview of zoning, such as in which zoning districts landfills are permitted, height limits, setbacks from roads and nearby houses, etc.

Emergency Action: Many local legislative bodies have the option of adopting a bill as emergency legislation. The bill then becomes law upon passage or signature by a mayor or other chief executive. Other wise, the bill may not take effect for a period of weeks or months after adoption. If you are concerned that a project may be exempted from the bill due to grandfathering or vesting, then explore the possibility of getting it handled as emergency legislation.

Moratorium: Consider calling for a *moratorium* if emergency legislation alone will not resolve your concern that a project may become grandfathered or vested before a new law can take effect. The moratorium would place a hold on further processing of permit applications for all projects similar to that targeted by the proposed law. For example, if you'd like to change the siting criteria for asphalt plants then the moratorium would put a hold on processing permits-approvals for *all* proposed asphalt plants; not just one plant of concern to you.

The duration of the moratorium depends upon the amount of time local officials will need to study the justification for changing a law and the best way to word the law so the intended purposes are

achieved without unduly infringing upon property-owner rights. Most moratoria last for six months to two years. Normally, a moratorium is initiated through a resolution adopted by the local decision-making body. In some states, a moratorium can only occur when there is a direct threat to public health. In other states local governments have broader discretion in using moratoria to get the time needed to study and enact improvements to their growth-management process.

Have Your Attorney Review The Bill: Have your attorney review the draft law to make certain it fully resolves your concerns, at least from a legal perspective. Your attorney should also look for any content that may result in the law being overturned by the courts, such as primacy or preemption issues. This *must* be an attorney hired by you; not an attorney representing the local government or someone else. Occasionally, a law will be written so it can be easily overturned by the courts. This is done by unscrupulous legislators attempting to give the appearance of being responsive to community concerns while they are in fact in the developers camp. The best way to avoid this and other booby traps is to have your attorney thoroughly review the bill.

WINNING THE ADOPTION OF A NEW LAW

For the most part, it will be the local legislative body that must enact laws affecting proposed development projects. Of course, this means you must convince a majority of the legislators to support the law. If a mayor, county executive, a governor, or some other official has veto power over legislative actions then you must either win the support of this official or that of enough legislators to override the veto. Guidance for winning the support of legislators and other officials was provided in *Chapter 39: Lobbying Key Decision-Makers* and *Chapter 36: Mobilizing Support For Your Strategy*. Following is additional advice specific to enacting a new law.

Identifying Friends & Foes

The first task in winning support for a new law is to learn how many legislators are likely to vote in favor of the measure. If you have a solid majority, then your job is simply a matter of hanging on to your supporters. If a clear majority is strongly opposed to the bill, then don't give up. There still may be a way to get the bill passed by amending problem language or mounting a far more aggressive campaign.

Hopefully you have at least one friend on the legislative body. This friend can poll other legislators to determine who is supportive, who is opposed, and who is undecided. If you do not presently have a relationship with a member of the legislative body, then start with the legislator who represents your area. If legislators are elected at-large, not by district, then ask around about which member tends to be the most community-oriented or pro-growth-management. Usually there's at least one legislator with such a reputation.

If your ally says they are the only one among seven legislators who supports the bill and the other six are strongly opposed, then you should take a second look at other strategy options. If a change in law is still your best option, then proceed ahead with the advice offered in the remainder of this chapter.

If you find that a clear majority of legislators support the bill and a veto is unlikely, then try bringing it to a vote quickly. Delay only allows opponents to strengthen their position.

A more typical scenario would be something like:

- two legislators are strong supporters of your bill;
- two are undecided;
- one is weakly opposed; and
- the other two legislators are solid opponents.

Given this scenario you should focus your lobbying efforts on the undecided's first, then the weakly opposed legislator. Winning the support of any two of these three legislators gives you a majority (four out of seven votes) when added to the two supporters you already have.

Turning Undecided & Weakly Opposed Legislators Into Supporters

Request a meeting with the undecided legislators for the purpose of learning more about their perspective on the proposed bill. Your goal is to find out what factors cause the legislators to be undecided, then to see if you can address their concerns without unduly jeopardizing the degree to which the bill resolves your concerns. If after making a genuine effort to address their concerns a legislator remains undecided, then you should quickly yet tactfully increase the lobbying effort beginning with the legislator's political family.

Networking Political Families: A political family are all those people an elected official relies upon for their future in politics. Political family members include the legislator's campaign manager, campaign contributors, campaign volunteers, the chair and central committee for the legislator's party, organizations that endorsed the legislator in the last election, and other elected officials who serve as mentors or king-makers.

Compile a list of each legislator's political family through the following steps.

1. Talk to your friend(s) on the legislative body to learn who influences the undecided legislator.
2. If the legislator has a website then visit it and look for the names of campaign staff, key volunteers, organizational endorsements, etc. Other wise, search local newspapers published during the peak of the last campaign. From newspaper articles and campaign ads you should get a list of endorsing organizations.
3. Check with the local elections office to see if campaign finance records are available. In some localities these records are online. If finance records are available then compile a list of those who made contributions to the legislator's campaign. Be sure to note those who gave money as well as in-kind services. While you are at the elections office get a list of the central committee

members along with precinct-by-precinct results for the last primary and general election in which the legislator ran.

Compile a list of all the individuals and organizations obtained through the preceding steps. Compare the list with your roster of supporters. Do you see anyone or a group which is a member of the legislator's political family and who is among your supporters? Have others active in your campaign look over the list as well for mutual acquaintances. Ask each mutual acquaintance for the following:

- Contact the legislator with a message along the following lines:

I understand you have some reservations about the bill. I certainly wouldn't ask you to compromise your principles. However, I want you to know that I understand your concerns, but I think they are outweighed by the benefits of the bill and it should become law.

- Ask the political family member to allow you to put their name on a list of those who support the bill;
- Ask if they have any friends on endorsing organizations or the party central committee and would they be willing to contact the organization about urging the legislator to support the bill; and
- Ask the political family member to review your list to see who is missing, particularly those who have the legislator's ear. Ask also if they would be willing to contact these folks for you or allow you to use their name as an introduction.

Ask everyone who lobbies on behalf of the bill to share the response they received from the legislator, particularly those who communicate face-to-face or by phone. This will allow you to track the effect of your lobbying efforts. Of course, you should also stay in contact with the legislator directly, perhaps calling every week or two and beginning the conversation with something like...

I know that some of our mutual acquaintances been contacting you about the bill. I wanted to see if there is any additional information I might provide at this point or if you have any new thoughts about how the bill might be modified to resolve both of our concerns.

If the legislator remains undecided then begin mobilizing support in those areas where the legislator got the most votes in the last election.

Mobilizing Support In A Legislator's Base Precincts:

Every county, city, and town is divided into election districts or wards, then precincts. A *base precinct* is one in which a legislator won a majority of votes in the last election.

Earlier in this section of the book I urged you to obtain precinct voting records while you were at the elections office. Following is a description of how you can use these results to increase the

number of people offering their support to the legislator if s/he opts to support the bill. And these will be people (voters) the legislator will be counting on to win the next election.

1. Look at the overall voting results for the last primary and general election in which the legislator ran. Focus on the election where the legislator won by the narrowest margin.
2. Highlight those precincts where the majority of votes were cast for the legislator.
3. Beginning with the precinct where the legislator won by the greatest margin, see if there is at least one vacant property within the precinct where the impact of development would be reduced if your proposed change of law were enacted.
4. Repeat step three with all other precincts the legislator won.
5. Return to the elections office. Request a file containing all of the registered voters located within the precincts identified above where there is at least one potential development site affected by the bill. If you are asked why you want the list, be honest, of course. Say you will use it to educate voters about an important piece of legislation. Many local election offices will not release voter lists if they think you are using it for marketing or some purpose other than electoral activity. If asked whether you want the complete record for each voter or just the walking list, ask for full records. If they ask if you want an electronic or hard copy, get the electronic version.
6. Identify the streets and street block number abutting each potential development site.
7. Sort the registered voters list by street name then house number.
8. Compile a mailing list of all voters who live within the abutting street block numbers.. If the list is very long then reduce the list to those who voted in three or four of the past four elections. These *frequent voters* are critical to winning elections and will have the greatest influence with the legislator. Frequent voters also tend to be the people who donate hours and dollars to political campaigns as well as causes such as yours.
9. Mail a letter to each voter with a message along the following lines:

Dear Ms. Jones:

I understand you live next to a vacant tract of land located at... I also live next to a similar tract of vacant property, only mine has been proposed for development as... My neighbors and I are deeply concerned that this development will harm our quality of life by... The same may be true if the property near you were proposed for similar development. Unfortunately, existing law does not allow our Town to prevent this impact. Therefore, we have asked the Town Council to adopt a new law providing the necessary authority.

Councilmember Smith has been reluctant to support the proposed law. I hope you would consider contacting Councilmember Smith at 987-654-3210 or CSmith@TownCouncil.gov and express your desire that they support the law. I will call in the next day or two to answer any questions you may have. In the meantime, I can be reached at 987-654-0123 or JaneDoe@Ourtown.com.

10. Be certain to place the follow-up phone call to each recipient a day or two after the letter should have arrived. Begin the call with something like...

Hi, this is Jane Doe. I wrote to you a couple of days ago about a bill that would protect you and me from development on properties like the one near your home at... Do you recall receiving the letter? If yes, ask if they have any questions. If they don't recall receiving the letter then summarize the content and ask for questions. In either case, ask if they would be willing to contact Councilmember Smith about supporting a new law that would protect both of you. If they agree then ask that they copy you with their letter or e-mail and any reply they receive and to let you know how their phone call goes with the Councilmember.

Through the preceding steps you can demonstrate ever-growing support for the legislator should they choose to vote in favor of the bill. And the support will be among the voters who are most important to the legislator's political future.

Again, you should start with the precinct where the legislator won by the greatest majority in the last election then move on to the next until completing all the precincts the legislator carried. Consider increasing the visibility of support by asking all those who agreed to contact the legislator if they would be willing to post a yard sign signifying their support. Hopefully, the legislator will shortly see your yard signs everywhere they travel within their base precincts. You could further increase the demonstration of support by holding a community meeting in each precinct, hopefully attended by a standing-room-only crowd. There are a variety of other approaches available for expanding the number of voters encouraging a legislator to support a bill. If you would like to discuss these options or any other topic presented in this chapter, then contact me at 1-800-773-4571 or Rklein@ceds.org.

When you have secured majority support ask friendly legislators to bring the bill up for a vote before the legislative body. The vote will usually take place at an open meeting of the body. Make certain you have a standing-room-only crowd present to witness the vote. The crowd should be composed of political family members as well as voters from the base precincts of the legislators who agreed to support the bill. This step will reduce the likelihood of any 11th hour surprises in the form of new amendments or legislators who switch their vote from yeah to nay.

What do you do when you can't convince a majority of legislators to support changing the law? Well one option is to elect more responsible decision-makers. If final action on a project can be held off until after the next election then you may succeed in replacing opposing decision-makers with

supporters. Guidance on how to pursue this option is provided in *Chapter 42: Electing & Retaining Candidates Committed To Responsible Growth Management*.