

ZONING

By David B. Lane Jan. 2003

Zoning is a police power exercised by local municipalities through the adoption of ordinances to control the use and development of property. Zoning is typically regulated through a zoning code controlling the permitted uses, size, density and location of buildings on private land, along with requirements for access and parking.

Most municipalities have enacted some form of zoning code for this purpose, administered by the local planning or community development department. What is permitted on a particular site generally falls into three categories as defined in a typical zoning ordinance. Permitted, conditional, and prohibited uses.

Permitted Uses

A permitted use is what can be built by right on a particular property under the current rules and regulations of the zoning code, the comprehensive plan and any other regulatory restrictions. Very often, a commercial development may be permitted, but still be subject to some form of site plan review to assure that the site is developed in harmony with factors such as the unique character of a historic neighborhood, or to deal with traffic congestion.

Conditional Uses (Special Permits)

The zoning use tables also provide, in many cases, a list of uses that may be approved subject to a discretionary approval process. Such a discretionary process, called either a conditional use or special use, usually involves an application, an environmental review and a public hearing with input from other town boards and abutting property owners. In order to grant such a discretionary permit, the municipality must typically find that the special use does not negatively impact surrounding properties. Discretionary permits also include variances where an unusual condition requires a special review and approval in order to permit something that is not normally permitted by the code.

Such special permits usually come with "conditions of approval" which are special requirements unique to each individual case. The special requirements may include restrictions on use, limits on height, added parking or the right of design approval. Typically these variances or special permits are recorded with a registry of deeds so that subsequent lenders and owners will be aware of any restrictions affecting the property.

Prohibited Uses

A municipal use code typically lists a number of activities that are prohibited in a zoning district. It is not unusual to review a copy of the current zoning ordinance and realize that a property is being used in a particular way that is presently prohibited under the code. Usually this is a situation where there is a pre-existing non-conforming use or structure.

While a building, once it is built, tends to be consistently used over a long period of time, the zoning code governing the size of the building and the use of the land tends to respond to changes in public policy and development patterns over that same time frame. The resulting changes in the code result in making many of the existing buildings in a municipality "non conforming" with respect to current laws. A non-conforming structure is one where the size, shape or location of the building no longer complies with the current requirements of the zoning code. An example of non-conforming structure would be one where a building was built 5 feet from the side property line in the 1930's when there was no restriction regarding how far a building should be set back from a property line. If, say in 1980, the city decided not to permit buildings to be built any closer than 10 feet from a side property line, the existing structure would then be considered non-conforming.

A non-conforming use is one that was originally established legally, but is no longer permitted by the current zoning designation at that particular location. For example, if a building houses a hotel/motel in a town that

now prohibits the development of hotels/motels, then the use would be considered pre-existing non-conforming.

Why is the non-conforming nature of the building important? Most jurisdictions severely restrict the ability of non-conforming uses and structures to expand or alter their facilities.

Just as importantly, a building's conforming/non-conforming status is an important factor in determining whether the building can be re-built in the event of a catastrophic loss. Many jurisdictions place limits on the amount of damage that can be repaired in a non-conforming structure.

Review of zoning issues is critical for anybody involved in the purchase or financing of commercial property. An experienced land use attorney can help clearly identify the zoning district, permitted uses, parking and dimensional requirements for a parcel of land. This detailed zoning analysis is necessary to satisfy the lender that the present use of the property is in conformance with local zoning and assure that the real estate closing is completed on schedule.