

CHAPTER XI

PLANNING, ZONING, AND SUBDIVISION CONTROL

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Planning is a way to link what is desired with what actually may occur. If a municipality plans adequately for its development, not only will it be prepared for change, but it can accomplish desired change and can prevent or lessen the effects of undesired change. Planning enhances the ability of a municipality to determine its future.¹⁰⁰⁰

THE COMPREHENSIVE PLAN

Sometimes referred to as the “community master plan” or “general development plan,” the comprehensive plan is one of the most important tools a municipality can develop to enhance quality of life and advance important economic and developmental goals. In short, a comprehensive plan is the general framework by which development controls (zoning, subdivision codes, historic preservation plans, design review, etc.) are created and related to existing community conditions and community goals. To pass legal muster all planning programs must be based on protection and advancement of the general health, safety, welfare of the community.

Usually, a comprehensive plan is a document, or series of documents, accompanied by maps, setting forth the type of community which exists today and what the goals and policies are for future development or redevelopment of a community. A comprehensive plan is long-range, with a time horizon of at least twenty years, but based on present information and assumptions.

Uses of the Comprehensive Plan

A solid plan has a number of significant roles to play in a community. The absence of a sound plan and planning process will place a community at a significant disadvantage in these areas.

The Legal Role - Because the plan is a declaration of municipal policy and purpose, in zoning litigation, courts have often looked at the existence of a plan as evidence that a municipality has considered all relevant issues in the zoning of a particular parcel. Sound planning forms the rational basis for the administration of land use and development controls within a community.

Role in Community Education - Through an inventory of its resources, the process of developing a plan can be a way for a municipality to determine its strengths and weaknesses. The inventory is usually undertaken early in a planning project. If the planning process is open, the views of all segments of the community can be articulated and consensus can be reached.

¹⁰⁰⁰Mel Scott, *American City Planning Since 1890* (Berkeley and Los Angeles: University of California Press, 1975), 152.

Role in Guiding Development - Private developers may use the plan as a gauge to measure the reaction of a community to a specific proposal prior to the submission of development plans. The planning commission can use the document as a guide to specific project approvals or disapprovals. Because it provides a broad view of the municipality, the plan may help separate and distill the issues in a dispute over a specific parcel of property.

The Coordination Role - The existence of a plan helps coordinate the activities of various municipal departments, public utilities, and other jurisdictions. Roads, water, sewers, schools, parks, and the like can all benefit from coordinated direction.

The Role in Planning - The plan can be used as a framework for additional planning by a municipality, for example, a closer study of a small redevelopment area.

Preparation and Adoption of the Plan

By statute the plan must address land use, transportation, housing, and community facilities. However, optional elements may be included addressing historic preservation, community design, redevelopment, neighborhood plans, and other more specific development concerns. Enabling authority for planning in Mississippi is set out in Chapter 1 of Title 17 of the *Code*.¹⁰⁰¹ The responsibility for creating a comprehensive plan may be granted to a municipal planning commission created by the municipal governing authority.

Once a plan is drafted, usually with considerable public input and the aid of qualified planning consultants, the planning commission will conduct public hearings as required by statute.¹⁰⁰² The rules and procedures of the commission should provide for such hearings. The plan is presented to the public, and questions are answered. The planning commission then considers the comments and questions, and the document may be amended several times before being recommended to the elected officials. The level of acceptance of a plan will be enhanced by the level of the public participation throughout the process.

Municipal authorities may conduct a public hearing or hearings to consider adoption of the plan or any revision or amendment to an existing plan. The elected body may hold the hearing or hearings or delegate the task to the planning commission. Notice of the public hearing must be published not less than 15 days prior to the hearing in a newspaper of general circulation in the county or counties where the municipality is located. The hearing may be informal, but all interested parties must be given an opportunity to be heard, and should be allowed to submit their comments in writing.¹⁰⁰³

¹⁰⁰¹*Code*, § 17-1-1 through § 17-1-39.

¹⁰⁰²*Code*, § 17-1-15.

¹⁰⁰³*Code*, § 17-1-15 and § 17-1-17.

Implementation of the Plan

Once the official comprehensive plan is adopted and filed with the municipal clerk, efforts should then be directed towards implementation of the plan. Implementation in its most common form is provided through the administration of zoning and subdivision regulations. Other desirable tools - include capital improvements plans, design guidelines, historic preservation ordinances, and economic development incentives. Such implementation ordinances should be based upon and consistent with the recommendations of the comprehensive plan.

It is the planning commission's responsibility to monitor development trends and problems with implementation of the plan, to make recommendations regarding zoning changes, to review and make recommendations on subdivision proposals, and to participate in the annual budget making process for the municipality. If there is municipal planning staff, it is the commission's responsibility to provide policy direction for that staff. All these activities should be guided by and relate directly and consistently to the official comprehensive plan.

Depending upon the pace of change in the community and its environs, the plan should be reviewed on an regular basis so that it remains responsive to the needs and issues of the people it affects. An increased number of rezoning requests or public improvement projects that are not consistent with the plan any indicate a need to update the plan.

ZONING

Zoning is the delineation of a city into areas, or zones, and the establishment of rules to govern land use and the location, bulk, height, shape, use and coverage of structures within each zone. Zoning is the primary implementation tool of the comprehensive plan. The plan establishes general areas for each use expected over the long term. Zoning delineates specific areas that are considered suitable for development of each use in the short term and protects developed areas from intrusion by incompatible uses.

Traditional Zoning Ordinances

A traditional zoning ordinance consists of two primary elements—the zoning text, which defines each zone and the conditions of use which are allowed in it, and the zoning map, which locates each zone in the municipality. As long as a zoning ordinance conforms to adopted planning purposes, including protection of public health, safety and welfare, it is considered a legitimate exercise of the basic police power of local government. However, there are ways in which that power can be abused.

A municipality cannot treat property owners in a discriminatory or arbitrary fashion. There must be a reasonable basis for different classifications of areas, and rules must be applied reasonably to specific properties.

Zoning typically divides a community into residential, commercial, and industrial zones. The zones can be further refined into more detailed areas such as single family, multifamily, retail, office, light industrial, manufacturing, institutional, open space, and the like.

Each district should contain a statement of intent, indicating the district's prime function, the characteristics which distinguish it from other districts, and the reasons for establishing it. The intent must have a substantial relation to the general purposes of zoning.

The number of residences allowed per lot is specified, as are the types of businesses allowed in commercial zones. Uses in each zone are generally of two types—uses allowed by right or under special conditions. Special or conditional uses must be reviewed on a case by case basis, while uses permitted by right require no such case review. Proposals for such uses are only allowed if they meet certain specific requirements designed to ensure they will be compatible with the uses allowed by right in the zone.

Flexible Zoning Controls

Frequently used departures from this traditional form of zoning include planned unit developments, floating zones, overlay zones, performance zoning, central business districts, mixed use zones, traditional neighborhood development and new urbanist provisions.

If the parcel is relatively large, a planned unit development can allow a mixture of uses within a parcel. The overall site plan, including streets, utilities, open space and public facilities, is submitted and approved before zoning is changed. Overall density and intensity of uses are consistent with the ordinance, but regulations do not apply on a lot-by-lot basis.

A floating zone is not shown on the map, hence the term “floating,” but allows the legislative body the choice of designating any of several logical locations for a use only when a property owner is ready to proceed with development of the use on a specific site.

The overlay zone is used to meet specific physical, cultural, or economic conditions not generally found in the municipality, such as older downtown districts, historic areas, slopes, and floodplains. A commercial district with a downtown district overlay may allow all the same uses as other commercial districts but have no side yard or setback requirements. A slope overlay may require that each lot be large enough or shaped to provide a building site on relatively level ground. An airport overlay may be used to restrict the height of buildings near the flight path or to increase the soundproofing requirements of construction. Historic districts serve a public purpose by preserving historic sites or buildings. Floodplain zones can be used to protect all development from flooding in areas subject to flooding.

Performance zoning allows controlled integration of uses based on the compatibility and individual characteristics of each use. There are fewer use specifications, but the acceptability of each use is determined by how well it meets general criteria relating to such factors as noise, vibration, smoke, odor, dust, glare, heat, hazards, parking, wastes, traffic, electromagnetic fields, and radioactive emissions. The intent is to control the characteristics of uses so that the character and the quality of the district is preserved. Such zoning is particularly common for industrial uses.

Other Requirements of Zoning

Traditional zoning ordinances specify the minimum size of lots, how far buildings must be set back from property lines, the height or number of stories of the buildings, how much parking must be provided, the width of the streets, and other design requirements. The setback, or yard, requirements may be an absolute number, e.g., twenty-five (25) feet from the roadway, or a percentage of the lot width for side yards or depth for front and back yards. Setbacks for property lines abutting streets may be expressed as a measurement from either the edge or the middle of the street's right-of-way. The number of parking spaces required varies with the type of use. While there are recognized standards for parking, the requirements may be modified to meet local conditions, such as the availability of public transportation or the average number of cars per resident. Most building height requirements are expressed as a combination of the height from the ground level to some point on the roof and the number of stories. Street widths are generally specified in accordance with the requirements of the agencies controlling them.

Traditional design requirements may hamper the ability of the land developer to preserve useable open space and valuable natural features. The cluster option found in many ordinances allows smaller lots, if the land gained is preserved as permanent open space. The zero lot line development, which allows side yard requirements to be combined on one side of the building can produce more useable open space for each residence.

The building size and setback requirements can be replaced by a more flexible lot coverage ratio which limits the maximum ratio between lot and floor space in the building. These ratios are called floor/area ratios or FAR's.

Parking may be shared, if the users sharing the parking have need for the spaces at different times or if an adjoining lot has more spaces than it needs. For example, a day-time use such as an office may share parking with a night-time use such as a theater. The same office may share parking with a church, which would only need the spaces when the offices were closed. These arrangements may be formalized in a covenant which is made between the property owners and which is recorded with the lots.

Nonconforming Uses or Grandfather Provisions

Even the most flexible zoning ordinances cannot cover all situations that exist when the ordinance is adopted. Some properties will not conform to the zone in which they find themselves, e.g., businesses are found in residential zones or buildings are built too close to the lot lines. There are several ways to handle these situations, including simply identifying them and leaving them alone. However the most common is to encourage eventual redevelopment in a way that is consistent with the ordinance.

Nonconforming buildings are usually eliminated by not allowing them to be enlarged, expanded, or, if damaged over a certain point, rebuilt or replaced. If the nonconforming use is discontinued for a specified period of time, it usually may not be resumed. If it is a nonconforming business, the type

of business is usually not allowed to be changed unless the new business is more compatible with the neighborhood.

An alternate strategy is to amortize each nonconforming use. The amortization period for structures depends on their current age and expected useful life. Uses are normally accorded the time any equipment used might be expected to be replaced. When the amortization period is over, the building or use must be removed or replaced with a conforming building or use.

Rezoning

The method and procedures for amending the zoning ordinance are set by state law.¹⁰⁰⁴ As with the original adoption of the zoning ordinance, all rezoning must comply with statutory requirements. A rezoning is actually an amendment to the existing zoning ordinance and requires the adoption of an ordinance. In general, land may only be rezoned by action of the municipal governing authority after a recommendation has been made by the planning commission and after holding the required public hearing.

Courts have generally held that the burden is upon the applicant for a rezoning to show that either there was a mistake in the original zoning in the form a scrivener's error or that a developmental change has occurred in the area of such a magnitude as justify the proposed rezoning. The governing authority should make note of these findings, or lack thereof, as part of the record.

Two-Thirds Requirement

By statute, an additional super-majority vote requirement exists when the rezoning is protested by the owners of twenty per cent (20%) or more of either of the area of the lots included in such a proposal, or of those immediately adjacent to the rear, and extending one hundred sixty (160) feet, or of those directly opposite, extending one hundred sixty (160) feet from the street frontage of opposite lots. In the event of a protest, the change must be approved by a favorable vote of two-thirds of all of the members of the legislative body.

Spot Zoning

Spot zoning generally describes a situation where property is rezoned for a use prohibited by the original zoning ordinance and out of harmony therewith. This is a common objection raised by those opposed to a rezoning, and is often argued that such a "spot zoning" is designed to favor someone. The validity of a spot zoning decision will depend on the circumstances of the individual use.

Checklist Analysis for Zoning Amendment Decisions

As a guide to determining the appropriateness of a rezoning, the following twenty (20)-item checklist might be used to evaluate potential zoning decisions:

¹⁰⁰⁴Code, § 17-1-15 and § 17-1-17.

1. Would change be contrary to the general welfare?
2. Is an administrative procedure available and preferable to rezoning?
3. Would the original purpose of the regulation be thwarted?
4. Have procedural requirements been met?
5. Are there sites for the proposed use in existing districts permitting such use?
6. Is the proposed change contrary to the established land use pattern and the adopted plan?
7. Would change create an isolated, unrelated district, i.e., is it spot zoning?
8. Have major land uses changed since the zoning was applied, e.g., new expressway, new dam, and so forth?
9. Is existing development of the area contrary to existing zoning ordinance, i.e., are there special uses or violations?
10. Can the owner of the property realize an economic benefit from uses in accord with existing zoning?
11. Would change of present district boundaries be inconsistent with existing uses?
12. Would the proposed change conflict with existing commitments or planned public improvements?
13. Will change contribute to traffic congestion or dangerous traffic patterns?
14. Would change alter the population density pattern and thereby increase, in a detrimental manner, the load on public facilities, schools, sewer and water systems, parks, and so forth?
15. Would change combat economic segregation?
16. Would change adversely influence living conditions in the vicinity due to any type of pollution?
17. Would property values in the vicinity be inflated by the change?
18. Would property values in the vicinity be decreased by the change?
19. Would change constitute an “entering wedge” and thus be a deterrent to the use, improvement or development of adjacent property in accord with existing zoning ordinance or plan?

20. Would change result in private investment which would be beneficial to the redevelopment of a deteriorated area?

Special or Conditional Uses

Zoning codes often set forth special or conditional uses. Special uses are reviewed on a case by case basis to determine the fit between the use and the proposed location. The question of fit or compatibility between use and location provides the opportunity for persons to lobby for or against a proposed use.

In general, a special use can be viewed as a proposed use of land or structures which, due to the unique characteristics of the use, must be reviewed independently of previous land use actions, and is often not classified in any particular zoning district due to the variety of potential impacts it represents in different locations.

Without clear-cut arguments concerning the necessity or compatibility of a use, the allowance of a special use can be viewed as arbitrary. Specific rationale behind the decision should be included in the record of the decision. Adherence to specific criteria or standards used in similar cases provides legal support when conflicts arise.

Standards or criteria for special use approval are often used on municipal applications, not only to provide a rational basis for decision making, but also to gain insight to the petitioner's reasons for the development request. The following are examples of such standards:

- ▶ The special use will accommodate, and is necessary for the public health safety and welfare of the community;
- ▶ The special use will not alter the essential character of the proposed location and surroundings;
- ▶ The location, size, intensity of operation, and access to the site will be appropriate to the orderly development of the area;
- ▶ The characteristics of the special use will not impair the value of adjacent parcels and property in the close vicinity;
- ▶ The special use will properly locate, design, and screen parking and circulation areas to avoid and alleviate traffic hazards potentially caused by the use; and
- ▶ The special use will not create fire or traffic hazards or overtax public utilities.

Variances

The zoning code cannot cover every property situation with a rule and regulation. Properties and uses can be unique. A variation from the zoning code must respond to a "unique hardship" or "practical difficulty," usually of site or existing condition. A variation should be considered a last

resort. Inappropriate granting of variances can undermine the entire zoning and subdivision codes, so decisions must be made carefully. If many similar requests arise, the zoning or subdivision codes should be reviewed to determine if either should be changed or if a particular policy should be developed to review such requests.

Site variations are allowances for properties which represent unique hardships in the development of the property. This may concern the angles, distance, and location of the lot lines to each other, which, together or individually, represent obstacles to proposed development. Many variations arise because of new zoning code implementation and the existence of older lots that were subdivided with no regulatory control. Development on such lots with modern structures can require variances to allow use of the property. Municipal officials must make the determination if the requested variance is the result of unique hardship related to the physical configuration of the lot or of building plans not appropriate to the lot.

Existing conditions can also provide unique hardships when existing structures or sites are used for purposes other than the original intent. For example, residential structures which become part of commercial district or special uses on lots created for other purposes.

Use variations are a poor planning practice and of questionable legal validity. A use variation is to allow a use in a certain zoning district that is not presently allowed in that district. The approval of such a request is actually a rezoning of a parcel, because it is allowing a parcel in one zoning district to be used in a manner allowed exclusively in another zoning district. These requests should be considered through the rezoning process.

Standards or criteria for variation approval are often used on municipal application to gain further insight into the petitioner's reasons for the variation request. The standards can generally outline the following concerns:

- ▶ The request for variation is distinguished from mere inconvenience of particular physical attributes of the parcel;
- ▶ The variation request is valid enough to circumvent existing city ordinance;
- ▶ Unique circumstances to the site are evident;
- ▶ The requested variation is unique relative to similar properties in the area;
- ▶ The unique circumstances have not been created by any person possessing an interest in the property;
- ▶ The owners of the subject property did not create the circumstance(s) requested for in the variation; and,
- ▶ The variation will not alter the essential character of the locality.

SUBDIVISION ORDINANCES

Governing authorities and planing commissioners must deal with a variety of zoning and land use controls on a regular basis. Subdivision regulations represent one of the most important land use tools available to local government.

While subdivision review is often characterized as a “non-discretionary” or “by right” procedure (assuming the property is properly zoned for the intended use), this is not necessarily true. It is important to remember that it is during this process that important decisions are made concerning the construction of major roads and utilities, the preservation of natural streams and drainage courses, the sizes and shapes of lots, and whether or not properties are developed into building lots or preserved as sites for important public uses, such as schools, parks, and rights-of-way.

Typical Subdivision Procedures

Most subdivision ordinances formally establish a two-step review and approval process for subdivision plats. The first step is review of a “preliminary” or “tentative” plat, followed by approval of a “final” or “record” plat. In reality, most communities, whether formally adopted as part of the subdivision regulations or informally practiced, use a four-step review process: (1) pre-application meetings, (2) review of the preliminary plat, (3) review of final engineering drawings and specifications, and (4) review and recording of the final plat.

The importance of the first and third steps is often overlooked when a community analyzes its subdivision review process.

Pre-Application Meetings

While not every community formally adopts a pre-application meeting as a required step in the subdivision review process, in reality, most developers will attempt to have one or a series of meetings with the municipal staff in order to identify potential issues before going to the expense of preparing a preliminary plat. Properly organized, the pre-application meetings can benefit both the applicant and the community, and can save the planning commission many hours of meeting time.

The subdivision ordinance should be viewed as a mechanism for implementing the goals and objectives of the comprehensive plan and as the principal guide for the development of a community. The applicant should discuss with municipal staff the policies in the comprehensive plan (including the official map) and the zoning restrictions which may affect the subdivision of the property. Among the items which should be addressed at the pre-application stage are the following:

Public Use Sites - Are any future school, park, or other public use sites shown on the comprehensive plan that would involve the property? If so, will the land be acquired? Will some or all of the property be dedicated to the municipality by the developer?

Transportation - Will major right-of-way dedications be required as part of the subdivision? Will a proposed cul-de-sac need to be made a through street? Will there be access limitations imposed due to the site's frontage on a major thoroughfare?

Environment - Is the property in the flood plain or are there any known wetland areas? As a result of Mississippi's Endangered Species Protection Act, are there any animals in the vicinity that may use the property as a habitat? Are there any structures or sites on the property that are historic?

Engineering and Utilities - Are there general or localized engineering issues which need to be addressed as part of the subdivision, e.g. drainage, general soil suitability, and so forth?

Zoning Issues - Will any types of rezoning or variance requests need to accompany the subdivision application?

Procedural Matters - Does the applicant understand what steps will be involved in the subdivision process and how long approval might take? (This is the all-time, number one question of applicants.) Does the applicant understand the responsibilities involved, e.g., the type of information that must be presented to the planning commission, number of prints required, and so on? Are there any dedications, exaction or impact fees, or other types of fees or payments that are likely to be required as part of the approval process?

Having these questions addressed early in the process can identify and resolve many issues which otherwise would take up an inordinate amount of the planning commission's time during the review of the preliminary plat.

Preliminary Plat Review

The preliminary plat stage is when most major issues related to the subdivision should be resolved. When the preliminary plat review stage is completed, the applicant should know how many lots will be allowed and what is generally expected with regard to major public improvements. The planning commission's review of the preliminary plat should identify and resolve the major design issues associated with the subdivision. One of the key issues to be addressed during the review of a community's subdivision regulations is what function is to be served by the preliminary plat. Is the preliminary plat intended to establish the general planning elements of the subdivision, e.g., approximate rights-of-way width and location of roads, general configuration of lots, and overall relationship to utilities, or should the plat include detailed information concerning engineering issues that may arise during review of the final engineering drawings, e.g., size of water and sewer lines, fire hydrant location, and precise storm drainage design?

The level of information that is required to be submitted during the preliminary plan review process is related to the types of development issues facing a community. Some communities allow an applicant to submit "soft line" designs for street and lot layouts for preliminary plats, but some require additional information such as preliminary storm drainage and traffic reports to make certain critical local issues are addressed prior to the approval of the preliminary plat.

Guarantee of Installation of Public Improvements

It is also recommended that the subdivision ordinance establish specific standards to guarantee installation of required public improvements. Issues related to the form and amount of the performance guarantee are best addressed during the review of the final engineering plans.

Final Plat Review

Following preliminary review and perhaps an engineering review, the final plat must be re-examined to make certain that any design changes that may have been necessary did not cause problems with the configuration and sizes of lots. The plat is also reviewed at this point to make certain the language regarding such matters as dedication of right-of-way, notes regarding setbacks and access limitations, and provision of easements reservation are in the proper legal form.

General Design and Improvement Standards

All subdivision applications should be reviewed for consistency with the Comprehensive plan. Such review should include attention to the following design and improvement standards:

- ▶ Lot and block size standards;
- ▶ Easement requirements;
- ▶ Standards for subdivision monuments;
- ▶ Public land dedication and reservation standards;
- ▶ Street right-of-way and pavement standards;
- ▶ Private street standards;
- ▶ Intersection design and improvement standards;
- ▶ Standards for cul-de-sac streets;
- ▶ Sidewalk and bikeway requirements;
- ▶ Mass transit planning standards;
- ▶ Subdivision and development involving flood plain areas;
- ▶ Preservation of streams and natural drainage courses;
- ▶ Storm water detention;

- ▶ Recognition of wetland areas;
- ▶ Tree protection and preservation standards;
- ▶ Erosion and sedimentation control measures;
- ▶ Preservation of important historic and cultural resources;
- ▶ Toxic waste clearance or elimination;
- ▶ Connection to public utility systems;
- ▶ Over-sizing of public facilities;
- ▶ Storm sewer design;
- ▶ Public water system design;
- ▶ Sanitary sewer system design;
- ▶ Underground utility requirements;
- ▶ Solid waste storage and disposal;
- ▶ Subdivision and development entrance signs;
- ▶ Common landscaped and fencing areas; and,
- ▶ Common recreation areas.

Standards for establishing homeowners' associations. The inclusion of these standards in the subdivision ordinance gives the applicant, as well as the staff and Plan Commission, a thorough understanding of the types of issues which must be considered and addressed when submitting an application for subdivision approval.