

**PART II: RESOLVING YOUR
CONCERNS THROUGH THE
GROWTH MANAGEMENT
PROCESS**

Chapter 27: An Introduction To The Growth Management Process

The purpose of Part II of this book is to explain how to resolve your concerns about a proposed development project through the growth management process. This chapter provides an introduction to how the process works with respect to a specific development project. An understanding of this process is crucial to determining which strategy options may provide your best path to victory. Subsequent chapters in this Part of the book will explain how to maximize the likelihood of resolving your concerns through each process.

PROCESS OVERVIEW

The goal of the process should be to manage growth in a way that preserves quality of life for existing and future residents while minimizing restrictions on the use of property. The process should begin with a master plan²⁰⁹ drafted by a broad cross-section of residents, business owners, government officials and other interested parties working collaboratively. If done well, the plan will set forth a consensus view of how a town, city, county, or region should grow.

Zoning is the principle tool used to implement the goals and objectives set forth in the master plan. The local zoning ordinance²¹⁰ will group compatible uses together into *zoning districts*. The ordinance will set forth the purpose of each district along with criteria for determining which parcels of land should be assigned to each district. For each district the ordinance will also contain a list of uses permitted by right and by special exception permit, conditional use permit, or special use permit. The ordinance will limit the intensity of uses, such as number of houses per acre. Specific standards will be provided for ensuring compatibility between uses within the same district such as how far buildings should be set-back from streets, height restrictions, the percentage of a lot or site that can be covered by buildings, parking requirements, etc.

A set of zoning maps will be prepared that implement the overall land use plan set forth in the master plan. The maps will be designed to separate incompatible uses such as residential neighborhoods and industrial activities. Additionally, mapping will strive for other goals, such as locating the highest intensity of use where roads, sewers, and other infrastructure have excess capacity or increased in capacity are programmed.

²⁰⁹ A master plan may be known as a comprehensive plan, general development plan, or by a variety of other titles.

²¹⁰ A zoning ordinance may also be known as the land use code, development regulations or other names. But in the context used above, zoning ordinance means that body of local law which sets forth zoning districts, criteria for establishing districts, the uses permitted within each district and performance standards.

A number of specific permits and approvals are needed prior to developing a tract of land. To obtain each permit-approval the applicant must demonstrate that the project meets various standards with respect to roads, water and sewage, schools, environmental protection, and a number of other factors.

There are more than 3,000 counties, parishes, or “equivalent” places in the United States. Additionally, there are also more than a thousand cities in the U.S. with a population of 25,000 or greater²¹¹ along with numerous other smaller municipalities - towns and boroughs. Many of these local jurisdictions have land use and zoning authority. You would think that with so many jurisdictions there would be dramatic differences in how growth management works from town to town, county to county, and from state to state. In many ways though, land use regulation is remarkably consistent throughout the nation. This is because local zoning laws are enabled by State statutes which in turn derive authority from the U.S. Constitution. Because of this common basis you will likely find that the growth management process in your area strongly resembles the following generalized description.

DEVELOPMENT REVIEW

Most projects will go through development review steps similar to that described in this section. Some projects, particular larger ventures, will undergo further evaluations which are described in the following sections.

1. The process usually begins when the applicant (property owner and/or development company) has an initial, informal discussion with the local planning director, their staff, members of the local legislative body, and/or the chief executive. Through these discussions the applicant hopes to learn of likely obstacles to project approval.
2. The applicant submits a concept or sketch plan for review by planning staff who then draft comments to the local planning commission. The comments will focus on compliance with concept plan requirements set forth in the local zoning ordinance and other applicable regulations. If the ordinance requires a finding of consistency with the master plan, then staff comments will address this issue as well.
3. The planning commission will hold a hearing on the concept-sketch plan, but the purpose will not be to approve or disapprove. Instead, the commission will inform the applicant of y potential conflicts with zoning ordinance requirements and other relevant issues. Public notice is given of the hearing, though it may be limited to an announcement in the legal section of a local newspaper or a sign posted on the site. An opportunity for public comment is frequently provided during the hearing.

²¹¹ See http://www.census.gov/prod/2002pubs/00ccdb/cc00_tabC1.pdf

4. The applicant submits a more formal plan, which may be known as a site plan, development plan, preliminary plan, or by another title. For the purpose of this description, I'll call it the preliminary plan.
5. Staff will again generate comments to the planning commission on the preliminary plan. The comments address compliance with applicable regulations and any other relevant issues.
6. The planning commission holds a public hearing on the preliminary plan. This time the commission will be obligated to make one of three decisions on the plan: approval, approval with conditions, or disapproval. The commission may also table a decision to allow the applicant, staff, or the public additional time to address specific issues. Public notice is given of the hearing and the public is afforded an opportunity to comment during the hearing.
7. There will usually be a process for appealing the decision of the commission, which must be filed within a short period (10-30 days) following the date of the decision. The appeal will be heard by a local hearing board or officer, the local legislative body, or the state trial court acting in an appellate capacity.
8. A project will frequently come back before the planning commission in the form of a final plan. The issues the commission is required to consider are usually narrower than those at play during the preliminary plan stage. So *please* do not wait until the final plan stage to present your concerns to the commission. Instead, you need to discuss your issues with staff at the earliest opportunity after you become aware of the project then present your concerns and recommendation before the commission at both hearings.
9. Those aggrieved by the final plan decision may again have an opportunity to appeal.
10. Once final plan approval is granted the project will not come back before the planning commission. Instead, the remainder of the process will consist of staff review of more detailed plans for compliance with the requirements for various specific permits and other approvals. Of course, the more detailed plans must conform to the project depicted on the preliminary and final plans approved by the Planning Commission. If all goes well building permits will be issued along with other approvals such as a grading permit, a well and septic permit, etc.

In addition to the normal development review outlined above, a project may also be required to go through the following additional processes.

MASTER PLAN AMENDMENT

A master plan serves as a blueprint for how a local jurisdiction should grow. A good master plan will be designed to foster the growth scenario most effective in preserving and enhancing quality of life for current and future residents. An amendment should be required whenever a development project is proposed which would cause growth patterns to significantly diverge from that envisioned in the

master plan. The quality of life implications of the project should be thoroughly studied in a process open to the public, particularly to those residents most directly affected. The goal of the amendment process should be to determine if the quality of life benefits of the project justify deviating from the growth scenario set forth in the master plan. If it will, then the plan should be amended. Planning staff and the planning commission will coordinate the amendment process and make recommendations. The local legislative body is usually the final decision-maker on master plan amendments.

ANNEXATION

Annexation is a process used to expand the area of a town, city, or other jurisdiction. This act can be critical to providing a local jurisdiction with the increased tax base needed to fund essential programs. Frequently, the goal of those requesting annexation is to gain access to public water, sewer, and other infrastructure which allows development at densities greater than that possible with wells and onsite sewage disposal systems²¹². However, annexation has also been used to increase the profits derived from development by shifting a site from a jurisdiction with stringent quality of life protection measures to one with lesser restrictions. Proposed annexations should go through the same thorough and open review process applied to master plan amendments. In fact, if annexation of the subject property was not envisioned in the plan, a master plan amendment should be required as well. As with a master plan amendment, planning staff and the planning commission will coordinate the annexation process and make recommendations. The local legislative body is usually the final decision-maker on annexation requests.

ZONING TEXT AMENDMENT

When a new master plan is adopted or an amendment is made it is frequently necessary to modify the zoning ordinance to achieve the goals and objectives contained in the plan. If the required changes are minor, then this may be accomplished through a zoning text amendment as opposed to rewriting the entire ordinance. Additionally, a development company may request a zoning text amendment to allow a mix of uses or density not permitted by the present zoning ordinance. This should not be viewed as being bad. In fact, many zoning ordinances do not allow the use of innovative growth management techniques such as Traditional Neighborhood Design²¹³ or other *Smart Growth* and *New Urbanism* approaches. However, text amendments should be evaluated for cumulative impacts to quality of life. If the amendment has the potential to take growth in a direction differing from that set forth in the master plan, then it should be evaluated through the intensive scrutiny applied to a master plan amendment. Planning staff and the planning commission will usually coordinate the text amendment process and make recommendations. The local legislative body is usually the final decision-maker on zoning text amendments.

²¹² Onsite sewage disposal include septic systems, package sewage treatment plants, etc.

²¹³ Traditional neighborhood design provides a mix of housing types at relatively high densities with neighborhood scale retail commercial in a layout that facilitates travel by car, bicycle, or transit.

REZONING

Most local jurisdictions will have three processes for changing how land is zoned. First, zoning will frequently be adjusted when a new master plan is adopted. Second, during the ten to twelve years between master plan updates there will be a process where the need for zoning adjustments is studied comprehensively. Third, a land owner may petition for a rezoning at anytime, though approval is usually granted only when it is found that the original zoning assignment was a result error or that various factors have changed to a degree which makes current zoning inappropriate. If a rezoning proposal has the potential to take growth in a direction differing from that set forth in the master plan, then it should be evaluated through the intensive scrutiny applied to a master plan amendment. Planning staff and the planning commission will coordinate the rezoning process and make recommendations. The local legislative body is usually the final decision-maker on rezoning requests.

PLANNED UNIT DEVELOPMENT

Many local zoning ordinances include Planned Unit Development (PUD) zoning districts. Within the PUD district greater flexibility is allowed with respect to mixes of uses and density. PUD districts are usually applied to larger tracts of land. Frequently the proposed site must be rezoned to allow the PUD. If the PUD has the potential to take growth in a direction differing from that set forth in the master plan, then it should be evaluated through the intensive scrutiny applied to a master plan amendment. Planning staff and the planning commission will coordinate the PUD process and make recommendations. If rezoning is involved then the local legislative body will usually be the final decision-maker on a PUD. Other wise, the Planning Commission or a planning director will be the final decision-maker.

SPECIAL EXCEPTION PERMIT, CONDITIONAL USE PERMIT, OR SPECIAL USE PERMIT

These three permits are very closely related. Most local zoning ordinances will list uses allowed *By-Right* along with those requiring a Special Exception Permit, a Conditional Use Permit, or a Special Use Permit. Uses requiring one of these permits are usually compatible with those allowed by-right within the same district, but it may be necessary to add conditions to achieve full compatibility. For example, a special exception permit, conditional use permit, or special use permit is frequently required to locate a church or other house of worship within a residential district. With day care and the many other activities taking place at churches, this use can result in quality of life impacts akin to those of retail commercial uses, like a neighborhood shopping center. Most local zoning ordinances will require a formal hearing on the permit to evaluate the potential for compatibility issues. Conditions may then be added to the permit to address issues such as buffering for visual and noise impacts, lighting restrictions, and so forth. If impacts rise to the point where they cannot be resolved with conditions then the permit may be denied. However, there may be a legal standard requiring a finding of *extraordinary impact*²¹⁴ in order for the denial to stand up on appeal. Planning staff will be responsible for studying applications for these three permits and will make a

²¹⁴ The extraordinary impact test usually requires a finding that the impact of the proposed use at the proposed location will be significantly greater than if the same use were proposed for most other similarly zoned sites in the jurisdiction.

recommendation to the decision-making body, which is frequently a hearing board such as a Board of Appeals or Adjustments.

SPECIAL HEARING

When a project includes a use that is similar to, but not identical, to those allowed in a zoning district then a special hearing may be required to determine if the use is permitted. A special hearing before the planning commission, a hearing officer or board may also be required for certain uses that tend to be problematic.

VARIANCE

This last review process is by no means the least, especially with respect to the controversy it creates. A variance should be used rarely and only when absolutely necessary to allow the owner some reasonable use of their property. A variance is usually granted to allow a use which is otherwise prohibited by the zoning ordinance or to relax standards such as building setbacks and height limitations. Some jurisdictions grant variances so frequently that the intent of zoning ordinance is undermined by allowing incompatible uses in such close proximity that quality of life is degraded. Planning staff will study variance requests and make a recommendation. The final decision-maker on a variance request may be the planning director in the case of an *administrative* variance, but the final decision-maker should be a hearing board, a hearing officer, or the planning commission.

In the next chapter further background will be provided on the decision-makers introduced above.

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 master 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 master 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 COMMISSIONS

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 adopt or reject.

HEARING BOARD - HEARING OFFICER

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

In some localities a hearing officer or examiner serves in the role normally played by a planning commission or a hearing board.²¹⁵ 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

²¹⁵ 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 master 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.²¹⁶ 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

²¹⁶ 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.

Chapter 29: Zoning

Through the master planning process a community decides where it wants to permit high-density housing, shopping centers, office space, and other land uses. Zoning is the principle means of implementing this aspect of the plan.

A local jurisdiction will adopt an ordinance establishing a number of zoning districts. These may include a half-dozen residential districts where the dominant use in each will range from single-family detached homes to townhouses or apartments. Other districts would include those geared towards agriculture along with commercial, industrial, and mixed-use development.

Each parcel of land within the jurisdiction is then assigned to a zoning district. The zoning ordinance will set forth the process by which the local decision-making body adopts the set of zoning maps which assign each parcel to a particular District. There will also be provisions for amending the maps. Both processes (adoption and amendment) usually require a public hearing before the local planning commission and the legislative decision-making body.

Some jurisdictions also employ overlay and floating zones. An overlay zone modifies the development permitted in underlying zones. For example, in my home state the Chesapeake Bay Critical Area has three overlay zones applied to all lands within 1,000-feet of tidal waters. Lands within the overlay zones must meet more stringent environmental protection requirements. A floating zone also modifies the uses allowed in the underlying district but are applied through a process beginning with a land owner request.

The zoning ordinance will set forth the following specific requirements for each district:

1. **By Right Uses:** These are land uses and other activities permitted within the District *by right*. For example, in most residential districts single-family detached homes are permitted *by right* as opposed to uses requiring a special exception or conditional use permit.
2. **Accessory Uses:** These are uses normally associated with those permitted by right, such as storage sheds or parking recreational vehicles on a lot zoned for single-family detached homes. But the zoning ordinance may contain restrictions intended to prevent an accessory use from causing an undue impact to adjoining property owners, such as limiting the number of RVs that can be kept on the lot.
3. **Special Exception, Conditional Use Permit, or Special Use Permit:** An activity requiring a special exception, conditional use permit, or special use permit is one which is normally compatible with other uses allowed in a Zoning District, but in some cases conflicts may arise. Usually, a formal evaluation is made to determine if there is anything about the proposed use which would cause excessive impacts on the particular tract of land. For instance, a golf course might be permitted by special exception or conditional use permit in a number of residential

districts. In most cases a golf course would be a use compatible with homes. But if the homes are served by wells which are likely to become contaminated by golf course fertilizers and pesticides then a special exception/conditional use permit might be denied. Or the permit might contain conditions that resolve the potential impact, such as prohibiting the application of chemicals in areas where they will likely cause well contamination.

4. **Bulk Requirements:** The zoning ordinance will contain limits on how parcels within each district can be developed. Common limits include:
 - a. Minimum and maximum lot size;
 - b. Minimum lot width and length;
 - c. Number of dwelling units allowed per acre;
 - d. Height restrictions;
 - e. Setbacks from lot lines, streets, wetlands and streams; and
 - f. In commercial districts limits on Floor to Area Ratio (FAR) such as 0.4 which means the floor area cannot be more than 40% of the lot area.

The zoning ordinance may also contain requirements for signs, parking, roads, historic preservation, environmental protection, adequacy of public facilities, and a number of other development considerations. The ordinance may also specify the composition, powers, and duties of the legislative decision-making body, the Planning Commission, the Board of Appeals, hearing officers, the planning director, and other officials. Finally, provisions will be included to amend the text of the ordinance - a zoning text amendment - to create a new zoning district or to modify the uses permitted within an existing district. A zoning text amendment is also known as a *curative* amendment in some areas.

Chapter 30: Annexation

In *Cities Without Suburbs*²¹⁷ former Albuquerque mayor David Rusk showed how towns and cities with “flexible” borders were able to maintain their tax base through a legal process known as annexation. Vacant or under developed land adjoining the municipality would be annexed into the corporate limits. When the property was fully developed the jurisdiction would reap the benefits in the form of increased tax revenue. Of course the town would also have to pick up the cost of providing public services. If the added revenue exceeded the additional expenses then town residents benefitted from either lower taxes or improved services.

In contrast, Mayor Rusk described towns that could not annex. Over time existing homes, businesses and schools aged while middle- and upper-income residents fled to the suburbs taking their higher tax payments with them. Lower income residents were left behind. Thus the municipality was faced with declining tax revenues and the higher expenses associated with a lower income population and deteriorating infrastructure.

While annexation is one solution to this problem it is not the only and not necessarily the best) solution. The *Smart Growth* movement was inspired in part by Mayor Rusk’s landmark work. Planning agencies, development interests and citizen advocacy groups began working together to reverse the factors which encouraged middle-class flight and sprawl. Policies were adopted which make it attractive to develop within existing towns and other population centers. But since the adoption of Smart Growth principles is far from universal and complete, annexation is still a common practice.

Development interests sometimes use annexation as a way of avoiding regulation. If a county has good growth management laws, but a town incorporated within the county has less stringent regulations, then a property owner may seek annexation into the town.

Annexation can also be motivated by a desire to access public services, such as water and sewer. A town with its own water and sewage treatment facilities may restrict access to properties located within the municipal boundaries. Properties adjoining the town can only develop at the much lower densities allowed on well and septic. Thus property owners wishing to maximize development profits have a strong incentive for requesting annexation into the municipality.

If the proposed annexation of a property will harm you or your neighbors, then take a look at the applicable laws. Could the annexation be done with conditions which resolve your concerns: a win-win solution?

²¹⁷ *Cities Without Suburbs*, by David Rusk, Woodrow Wilson Center Press, 0-943875-74-9, 168 pp., 2nd Edition 1995.

If the annexation is motivated by a desire to avoid regulations, which would otherwise resolve your concerns, then can you convince the municipality to adopt similar laws? If not, then perhaps your best recourse is to find some portion of annexation requirements which the applicant fails to meet. Or can you convince final decision-makers to deny the application? Look to the decision-makers in both jurisdictions. Approval may be required from not only municipal officials but also those administering the jurisdiction in which the property is presently located. Also, approval may be required of a majority or all of those who own property within the area proposed for annexation.

Chapter 31: Variances & Waivers

Most zoning ordinances contain provisions allowing the local jurisdiction to grant a variance or a waiver for certain requirements. For example, if someone wants to build a garage but they cannot meet, say, a 10-foot property line setback, but they can keep the garage eight-feet away, then they may get a variance, particularly if they proved that the variance was needed because of some unusual characteristics of their property and other criteria are met. Many local jurisdictions also require the applicant to demonstrate that the variance is needed to relieve hardship. In some localities a variance is called a “modification.”

In their book *Land Use*²¹⁸, law professors Robert Wright and Morton Gitelman said the following of variances:

The variance is the most controversial, most abused, and usually the most used administrative relief that can be granted in requests for zoning changes.

Professors Wright and Gitelman cited a Pennsylvania Supreme Court decision²¹⁹ as offering an excellent description of four factors that should be met prior to the granting of any variance. These factors are:

1. “that an unnecessary hardship exists which is not created by the party seeking the variance and which is caused by unique physical circumstances of the property for which the variance is sought;
2. that a variance is needed to enable the party's reasonable use of the property;
3. that the variance will not alter the essential character of the district or neighborhood, or substantially impair the use or development of the adjacent property such that it is detrimental to the public's welfare; and
4. that the variance will afford the least intrusive solution.”

The professors went on to say that...

If every board of adjustment and every court were more aware of these factors and applied them more rigorously in place of bending them to meet the economic aims of developers and landowners, use variances would no longer constitute a synonym for evasion of zoning

²¹⁸ *Land Use in a Nutshell*, published by West Group, St. Paul, MN, 2000

²¹⁹ *Larsen v. Zoning Board of Adjustment of the City of Philadelphia*, 543 Pa. 415, 672 A.2d 286 (Pa. 1996).

restrictions. As matters stand today, zoning is as much characterized by the variances from it as by the adherence to it.

A variance may be granted to a use restriction or an area restriction.

Use Variance: Most zoning ordinances specify the uses (activities) permitted within each zoning district. The ordinance, enabling statutes, or court precedents may allow the local jurisdiction to grant a variance to the use restriction when certain factors, like the four presented above, are met. For instance, apartments may be prohibited in a district intended primarily for single-family homes. But it may be possible to obtain a variance for the addition of a granny apartment within a single-family home.

Area Variance: An *area* variance would be needed to reduce, say, the minimum setback required from the front of a proposed building to the edge of a street or a variance might be granted to the minimum acreage required to build a home.

In my experience, it is rare that variances are granted to zoning requirements that directly affect public health and safety. I have never seen a variance to the 100-foot minimum setback a number of states require between a shallow well and a septic system. Nor have I seen a variance to intersection sight-distance requirements though some applicant traffic engineers do come up with creative arguments that less distance is required than called for by generally accepted guidelines.

The criteria for granting variances to environmental standards will frequently contain factors in addition to the four presented above. These factors may include a condition that the decision-making find that a variance will not cause a net increase in water pollution or that other specific environmental requirements are met before a variance can be granted.

Waivers: Occasionally land use ordinances will allow for a *waiver* of specific requirements if certain conditions are met. For instance, an applicant might receive a waiver from stormwater management requirements if it was determined the project would not cause adverse impacts downstream.

In many jurisdictions, an applicant must go before the local Board of Zoning Appeals or Zoning Adjustments to obtain a variance. However, some jurisdictions have granted the planning director the authority to issue a variance but allow citizens to contest the decision to a local Board of Zoning Appeals. A similar appeals process is sometimes available for waivers. In fact, some jurisdictions allow citizens to appeal virtually all land use decisions made by the local government.

Chapter 32: Development Review Process

A zoning ordinance or subdivision regulations will set forth the process for reviewing a proposed development project. Typically the process will consist of the following steps:

1. First, if necessary, the applicant requests a master plan amendment, annexation, a water and sewer plan amendment, or a change in zoning.
2. If the project requires a special exception, conditional use permit or a variance then a decision is made as to whether these approvals will be granted. In many cases a formal hearing is held.
3. A concept or sketch plan is submitted so staff and/or the Planning Commission can determine if there are any basic issues which would make eventual project approval unlikely.
4. Following concept or sketch plan approval, a more detailed preliminary plan is submitted along with various supporting documents such as a traffic impact study, stormwater management analyses and plans, architectural drawings, etc.
5. If preliminary plan approval is granted then the applicant proceeds with submission of the even more detailed plans required for final development/subdivision plan approval.
6. If the final development plan is approved then the applicant proceeds to the issuance of the grading and building permits required to actually break ground and start construction.

Many jurisdictions will combine similar steps in the process. For example, preliminary plan approval may be considered simultaneously with special exception-conditional use permit review. This is because both require a similar analysis and it is more efficient to carry out the analyses at the same time.

If you are grappling with a project which is so poorly conceived that the impacts cannot be resolved, then your best opportunity to defeat it will be at the first two steps in the development review process. In other words, you must start early and convince final decision-makers to deny the master plan amendment, annexation, a rezoning request, a special exception, the conditional use permit, or a variance. If a project is consistent with zoning and does not need a special exception, conditional use permit or a variance, then it is very likely that it will eventually be approved, as it should be. Your best opportunities to win changes that resolve project impacts will be at the first four steps in the process described above.

Chapter 33: Public Participation

The zoning ordinance may also contain requirements for notifying the public about proposed development projects and opportunities to comment. Public notification could be as little as a legal announcement in a newspaper to something more responsible, such as posting signs on the site along with mailings to adjoining property owners. The notice may be given a week to several months prior to a hearing or the deadline for public comment.

A legal notice a few weeks before a hearing is not a very effective way for allowing the public to participate in the development review process. My home county (Baltimore County, Maryland) has one of the best development review public participation processes in the nation.

First, a Community Input Meeting (CIM) is held in the evening at a location near the proposed development site. The CIM is announced with a sign posted on the site, a mailing to adjacent property owners and the community associations active in the area, and a listing on the County's website. A copy of the applicant's Concept Plan is mailed out to any interested party. Both the applicant and County officials attend the CIM to explain the project and to answer citizen questions. Copies of the project Concept Plan are distributed. The County officials take detailed notes on citizen concerns. The applicant is encouraged to resolve each relevant issue.

Next, the applicant submits a Development Plan. A Development Plan conference is then held between the applicant and County officials. At the conference County officials discuss their outstanding concerns with the applicant. The public is allowed to attend the conference, but not to participate in the discussion.

Within 10 to 21 days following the conference a County hearing officer holds a public hearing on the Development Plan. Though this is a formal legal proceeding the public can present their concerns, the facts supporting each concern, and even question the applicant's witnesses if they are not represented by an attorney. The hearing officer can approve or deny the development plan. The hearing officer also has the option of approving the plan with any reasonable conditions needed to resolve outstanding issues.

If citizens are dissatisfied with the hearing officer's decision then they can take an appeal to the County Board of Appeals. If they are dissatisfied with the Board's decision then they can appeal to Circuit Court then the Maryland Court of Special Appeals.

When the CIM process was first proposed, many thought it would greatly increase citizen appeals of development approvals. In fact, this has not been the case. The process has probably had the opposite effect. By informing citizens of development proposals very early in the process it is easier for citizens to judge whether the project will cause undue impact and to work with the applicant and the County to resolve their concerns. So the CIM process has probably reduced the number of appeals and improved the compatibility of new development with existing land uses.

Chapter 34: Permits & Other Approvals

In addition to those discussed above, following are the permits and other approvals a project may need to acquire along the path from conception to ribbon-cutting.

ADEQUATE PUBLIC FACILITIES

Some local jurisdictions have adopted adequate public facility ordinances (APFOs). The intent of APFOs is to manage development approvals so that schools, roads, water, sewer and other infrastructure are not overtaxed. Frequently, APFO requirements kick in at the building permit stage. In other words, a building permit would not be issued unless adequate capacity is available to accommodate the students generated by construction of a new home along with other additional service needs.

BUILDING PERMIT

Issuance of a building permit is usually the last step in the development review process. To get to the building permit stage an applicant must have complied with all zoning and subdivision requirements. The building permit focuses on compliance with codes for plumbing, electrical, construction practices, and so forth. In jurisdictions without zoning and subdivision regulations, this may be one of the few permits/approvals required before a project can break ground.

If you just learned about a project and all other permits/approvals have been granted, except for the Building Permit, then the likelihood of resolving your concerns is not good. The applicant has invested a lot of money in getting the project to this final design stage. The reviewing agencies have gone on record as approving the project. Relatively little flexibility remains for making changes. To win your concerns would need to be obvious, substantial, and correctable without major changes to the project.

ENVIRONMENTAL IMPACT STATEMENT

Most development projects are not required to comply with the environmental impact statement (EIS) provisions of the National Environmental Policy Act (NEPA). NEPA only comes into effect when a project involves a major federal action and that action is likely to result in a significant impact.

Examples of a major federal action would include projects where federal funds are used or federal permits are required. NEPA requires that all major federal actions be subjected to three levels of analysis:

- categorical exclusion determination;
- preparation of an environmental assessment/finding of no significant impact (EA/FONSI); and
- preparation of an environmental impact statement (EIS).

Categorical Exclusions apply to specific types of projects where prior analysis has shown that the project type does not cause a significant impact. If a project does not qualify for a categorical

exclusion, but further analysis (an environmental assessment) shows it will not cause harm then a Findings of No Significant Impact (FONSI) is issued. An EIS must be prepared for projects which fail to receive a categorical exclusion or FONSI. For further detail on NEPA go to: <http://www.epa.gov/compliance/nepa/index.html> and <http://ceq.eh.doe.gov/nepa/nepanet.htm>

As of 2003, sixteen states had adopted their own version of NEPA, usually called a State Environmental Quality Act (SEQA) or little NEPA: Arkansas, California, Connecticut, Florida, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, South Dakota, Virginia, Washington and Wisconsin. Additionally, the State of Pennsylvania was considering the adoption of a SEQA.

Most of the SEQAs only apply to State projects, although some encompass private projects as well. The Washington State Environmental Policy Act (SEPA) process is arguably the most comprehensive with respect to individual development projects.²²⁰ The following [CEDS website](#) publication contains an analysis of a proposed development project for compliance with the Washington state SEPA requirements, [Salmon, Lake Quality, Wetlands & Development Impacts - An Example of CEDS Analysis](#).

EROSION & SEDIMENT CONTROL PLAN APPROVAL

The impact of construction phase erosion and sediment pollution was described in the section of this book on aquatic resources. The U.S. Environmental Protection Agency (EPA) requires the use of erosion and sediment control measures on all construction sites five acres or larger. A number of states and local jurisdictions have also adopted their own erosion and sediment control requirements which may apply to all construction sites, not just those five acres or greater.

In areas where just the EPA requirements are in place the applicant must file a Notice Of Intent (NOI) form. A storm water pollution prevention plan (SWPPP) must be prepared which describes the Best Management Practices (BMPs) which will be used to minimize erosion and sediment pollution. The EPA BMPs requirements can be downloaded from: <http://www.epa.gov/owow/nps/urbanmm/index.html>

If erosion and sediment control is among your concerns then you should obtain the BMP requirements from the EPA site or from your state-local government. Arrange an opportunity to review the applicant's SWPPP. Compare the proposed BMPs with those presented in the EPA, state or local manual. Consider the advice provided in the aquatic resource impact section of this book on maximizing the effectiveness of construction phase controls. Verify that the applicant is taking all steps necessary to protect the aquatic environment.

²²⁰ For further detail on the Washington State Environmental Policy Act process visit: <http://www.ecy.wa.gov/programs/sea/sepa/e-review.html>

FIRE DEPARTMENT

In many localities the fire department will review a proposed development project for any factor with might impede fire suppression. These factors include:

- sufficient water pressure in areas served by public water;
- the need to install a pond, tank or other measures to ensure adequate water is available to fight fires in remote areas;
- proximity to areas subject to wildfires;
- at least two means of accessing a site (many local jurisdictions discourage projects where there would be only one road in and out that might be blocked thus preventing emergency vehicle access);
- the need to require sprinkler systems;
- whether building height or other factors exceeds the capability of fire equipment; and
- minimum response times from the nearest fire station (National Fire Protection Association standard 1710 requires a response time of four minute or less for career fire stations).

Further detail on this topic is provided in the section on *Fire* in Part I of this book.

GRADING PERMIT

A number of local jurisdictions require an applicant to submit a grading plan. If the plan complies with requirements such as erosion and sediment control then a grading permit is issued. The purpose of this permit is to ensure that grading, filling, and site clearance is done in a way which minimizes adverse effects. Through the grading permit review process other issues may be screened, such as checking to see if limits of disturbance will intrude upon aquatic resource buffers or onto adjoining properties, minimizing forest loss or altering viewsheds, and guarding against impacts to historic or archaeological resources.

HIGHWAY ACCESS PERMIT

To connect to an existing local or state road, one may need a highway access permit, even for a new driveway. To obtain the permit the applicant must demonstrate that safety will not be jeopardized. For example, the applicant must demonstrate that the sight-distance criteria presented earlier in this book are met. The applicant may be required to submit a full traffic impact study, especially for larger projects.

If traffic is among the concerns you have about a proposed development project, then contact the agency responsible for the affected roads. The responsible agency will usually be obvious from looking at a map or signs posted along the road. For example, if the road is a state route then it is maintained by the state highway agency. As always, request an opportunity to review any applications and other documents submitted for the proposed access. Compare the information presented in these documents to the agency's criteria for granting an access permit. Discuss any unresolved concerns with agency staff.

HISTORIC RESOURCE REVIEW

This topic was covered in detail earlier in Chapter 11. Many local jurisdictions and state agencies will review proposed development projects for impacts to historic or archaeological resources. Frequently this is done by the planning and zoning staff. The local zoning ordinance may require staff to sign-off on historic resource preservation requirements before a preliminary or final development plan can be approved. An assessment of impacts to historic resources is one of the elements of an EIS. To locate the local historic preservation review office for your area go to the [NPS Heritage Preservation Services website](#).

NPDES POLLUTION DISCHARGE PERMIT

If an applicant proposes to construct a sewage treatment plant or some other new *point* source of pollution then they must comply with the provisions of the National Pollution Discharge Elimination System (NPDES) of the federal Clean Water Act. NPDES permits are not required for most *nonpoint* pollution sources such as septic systems serving individual homes and cropfield runoff.

An NPDES discharge permit must be obtained before a project commences. For the most part, EPA has delegated the authority to states for issuing NPDES discharge permits. To receive a permit the applicant must demonstrate that the discharge will be treated to a level sufficient to prevent a violation of water quality standards. Further information on the NPDES system can be found at: <http://cfpub.epa.gov/npdes/>.

If a project will connect to an existing sewerline then review the compliance history for the plant which treats the wastewater carried by the sewer. Compliance information for existing permitted discharges can be viewed at: <http://www.epa.gov/enviro/html/water.html#PCS>

If the plant is running at or over the design capacity or experienced one or more major violations a year, then these problems should be corrected before further connections are allowed.

OCCUPANCY PERMIT

Once construction of a home or other buildings has been completed the local government will issue a final approval known as an *occupancy permit*. If an applicant has failed to comply with some requirement crucial to the protection of you and your neighbors, then urge the local government to withhold the occupancy permit until the problem is resolved. Of course there must be some logical connection between the unresolved issue and the occupancy permit. For instance, if the applicant were required to install a required visual buffer between your home and a new commercial building, then it would be logical to withhold an occupancy permit. But if local officials had made a decision earlier in the process not to require a buffer then it is less likely you can delay occupancy permit issuance.

SEPTIC SYSTEM PERMIT

The aquatic resource effects of septic systems was covered in detail in a prior section of this book. Before construction may begin on a home or other building served by a septic system, the local health department must certify that the site meets minimum requirements. If the project of concern to you

will be served by a septic system then request an opportunity to review the health department's files. Compare results of percolation tests and other site investigations with the criteria contained in local or state law. Also compare the project with the recommendations given earlier in this book for protecting aquatic resources from septic system impacts. If you feel the criteria have not been met or some unusual condition exists which could cause undue impact, then ask the health department to withhold the septic system permit.

STORMWATER MANAGEMENT PLAN APPROVAL

Once the construction phase is completed, stormwater runoff from rooftops, streets and parking lots introduces a new set of aquatic resource impacts. Many local jurisdictions and some states have enacted laws mandating the use of BMPs to reduce the impact of post-construction stormwater runoff. In other localities, especially towns and cities with a population of 100,000 or more, the EPA Stormwater NPDES Program requires control of runoff impacts from separate storm sewers.²²¹ The portion of this book on aquatic resource impacts described measures to reduce or eliminate stormwater impacts. If stormwater management is required for the project of concern to you then request an opportunity to review the plans. Determine if highly-effective BMPs are proposed. If not then consider encouraging local officials to require these measures, particularly if the project threatens uniquely important or sensitive aquatic resources.

USE OR ZONING PERMIT

The local zoning ordinance will list a number of uses allowed by right or as accessory uses within each zoning district. An *accessory use* is one which is minor and commonly associated with the primary use of properties within a zoning district. Accessory uses should cause few, if any, compatibility problems. An example of an accessory use would be a small shed for storing a mower and other lawn-garden equipment in a zoning district where the primary use is single-family detached homes.

Many jurisdictions require a *use or zoning permit* whenever a property owner wishes to add one of these uses. A gray area emerges when a proposed use does not quite correspond to any of those allowed by right or as an accessory use. Normally, a use permit does not involve notification of adjoining residents. Instead, the property owner submits an application which is reviewed by staff. If the use conforms to applicable regulations then a permit is issued.

WATER & SEWER PLAN AMENDMENT

If a site is located outside the area served by public water and sewer services and the applicant wishes to build at densities greater than those possible with well and septic, then they will need to request an extension of water and sewer lines. Many local jurisdictions have adopted a master water and sewer plan which serves as a critical growth management tool. Extending water and sewer beyond

²²¹ For further detail on EPA's separate storm sewer NPDES program visit: <http://cfpub.epa.gov/npdes/stormwater/munic.cfm>

the areas shown for service in the plan may require an amendment. Frequently, the local council or commissioners must hold a formal public hearing on an amendment request.

If vacant sites exist within the areas where water and sewer lines already exist, then growth should be directed to these locations first before extensions are made to other areas. It would be a waste of tax-dollars to construct new water and sewerlines while existing infrastructure goes underutilized. Similarly, new development should be directed to *redevelopment* sites, such as empty warehouses or abandoned shopping centers. If existing water and sewerlines are fully utilized then the applicant should be required to pay for service extensions.

If a project site is within an area designated for water and sewer service then the applicant may still need an approval to connect, which may go by the name of a water or sewer allocation. Local utilities use allocations to keep track of the commitments made to provide service. The allocation tracking system prevents a utility from committing to services which exceed their capacity.

WATER APPROPRIATION PERMIT

If a project will require water pumped from an aquifer or a surface source (lake, river, etc.) then they may need to apply for an appropriation permit from a state agency. Occasionally, local approval is required as well. Frequently, these permits are issued by the state natural resources or environmental agency. To obtain a permit the applicant must demonstrate that the quantity of water requested is truly needed and that the withdrawal will not adversely affect other users or the environment.

In eastern states water appropriation law is based upon the riparian use doctrine which allows those owning property adjoining a water body to make reasonable use of the water as long as it does not interfere with the rights of other riparian property owners.

In the west the prior appropriation doctrine is more common. This doctrine states that the first person to make beneficial use of water retains control of the water in perpetuity. In some states, like California, both doctrines apply.

WELL PERMIT

In addition to (or in-lieu of) a water appropriation permit local or state government may require an applicant to obtain a well permit before drilling commences. The permit will carry with it specifications on how the well is to be constructed to prevent contamination. For example, the driller may be required to extend the well a foot above ground so surface runoff cannot flow in through the top. Also, the applicant maybe required to case the well in solid pipe from the surface to bedrock or the first layer of impermeable clay. Grouting with concrete may be required to further seal the well from contamination. Some states require the driller to submit a completion report for each well they construct. These reports can provide a wealth of valuable information about groundwater conditions,

geology and the vulnerability of wells to contamination from septic systems and other sources. The state or U.S. Geological Survey can also provide information on groundwater conditions.²²²

WETLAND PERMIT

The federal Clean Water Act prohibits dredging or the placement of fill within *waters of the United States*, which includes all our tidal waters, flowing waters (streams and rivers), lakes, ponds and wetlands. The upstream limit of *Waters of the US* extends to the head of intermittent stream flow.²²³ The U.S. Army Corps of Engineers (USACE)²²⁴ is the lead agency on wetland permits, though a number of states and local governments also regulate dredging and filling in wetlands and other waters.

The USACE has two broad categories for wetland permits: general and individual. General permits cover relatively minor activities which individually have minimal impact but could have a considerable effect cumulatively. Individual permits are required for activities with more substantial impact. For example, a proposal to construct a bridge across a small stream might qualify for a general permit whereas a proposal to build a road crossing impacting an acre or two of wetlands would not.

General permits vary from state-to-state. So check with your district USACE office to obtain detail on general permits.²²⁵

Before the USACE can issue a wetland permit your EPA regional office or the state environmental protection agency must grant a [Water Quality Certification](#) for the project. The WQC certifies that the proposed activities will not violate applicable water quality standards.

At first it might seem obvious what is a wetland. But in reality wetland identification gets a bit complex, particularly when attempting to decide where a wetland starts and ends. The bible on wetland identification is the USACE *1987 Wetland Delineation Manual*.²²⁶ For larger development sites a USACE official will walk the area and prepare a *jurisdictional delineation* showing where dredging-filling would require a Corps permit.

²²² Visit the U.S. Geological Survey at: <http://www.usgs.gov/>

²²³ An intermittent stream carries water for more than just the period immediately after a rainfall-snowmelt-runoff event but less than year-round. Intermittent streams are shown as a broken blue line on topographic maps.

²²⁴ For further information on U.S. Army Corps of Engineers wetland permitting visit: <http://www.usace.army.mil/public.html#Regulatory>

²²⁵ To locate the USACE district for your area visit: <http://www.usace.army.mil/where.html#Divisions>

²²⁶ The U.S. Army Corps of Engineers Wetland Delineation Manual can be downloaded at: <http://www.wes.army.mil/el/wetlands/pdfs/wlman87.pdf>

If an applicant has proposed activities in areas which may be waters of the U.S., then contact the USACE district office for your area as well as any state or local agencies regulating activities in streams, wetlands and other waters. Request an opportunity to review project files. Discuss any unresolved concerns you have with agency staff. If you are dissatisfied with the results of these discussions then go on to the next section of this book on strategy options.