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Processing a Land Use Application in the City of Chicago

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I. [10.1] INTRODUCTION

As of the printing of this edition, the 2004 Chicago Zoning Ordinance has been in effect just over five years. Initial impressions of the ordinance were that it reflected the increasing level of government control of development that has been the hallmark of zoning decision-making in Chicago in recent years, particularly with respect to the design of what is to be built. What was touted by its authors as a predictable, self-executing code has become the reality of a pervasive effort to define development through government oversight, a fact that zoning officials deny. They answer that a more restrictive code meets the needs of Twenty-First Century Chicago and promises that future development will be “in context.”

Experience since the ordinance’s adoption bears out its greater emphasis on urban planning principles and greater government control of development, resulting in a significant contraction in the universe of developments that can be considered a matter of right. Furthermore, formal review of certain proposed developments by agencies of government not traditionally part of the zoning review process has added time and a greater measure of uncertainty to the approval process. Predictability and self-execution consequently have given way to the need to satisfy multiple masters with often divergent concerns and goals.

Two related dynamics also bear mentioning at this point, *i.e.*, the greater influence on the development approval process in recent times of organized community groups and the often significant increase in the cost of development resulting from ordinances adopted to advance initiatives such as affordable housing creation or those imposing additional review fees.

Nonetheless, whatever the philosophical basis of the code, meeting client zoning needs requires attention to the various aspects of the process as discussed in §§10.2 – 10.20 below.

NOTE: The current Chicago Zoning Ordinance and the digital map of the city’s zoning districts are available on the City of Chicago Department of Zoning and Land Use Planning’s website, www.cityofchicago.org/city/en/depts/zlup/supp_info/chicago_zoning_ordinance.html. Please refer to the site for the most up-to-date version of the ordinance.

A. Analyzing the Development

1. [10.2] Scope of the Building Program

The need to ascertain the nature of the proposed use and the density of the development is obvious. These are the threshold issues in any zoning matter. The Chicago Zoning Ordinance distinguishes between related yet different types of residential use (detached house, townhouse, and multiunit residential), business establishments (limited restaurants, general restaurants, and taverns), and commercial and manufacturing facilities (artisan production and limited, general, and intensive industrial). It is therefore necessary to know precisely what uses are to be established at the site. Density — or floor area ratio (FAR) — is of paramount importance to both the developer and to the regulator. For the developer, it is an essential element of the potential economic success of the building program. To the regulator, density is not only a measure of intensity of development but also a standard by which to compare the development with others nearby.

Analysis of the development plan also must focus on the footprint of the proposed structure, *i.e.*, its size, configuration, and placement on the property. Setbacks, required front, rear, and side yards, lot coverage, treatment of open spaces, and on-site traffic circulation also must be considered. The Chicago Zoning Ordinance also imposes height limitations in certain areas and sets standards for parking and loading.

2. [10.3] Limitations of the Zoning District

The zoning district in which a particular site is located can be ascertained by reviewing the relevant zoning map. Standards for development vary by district. A particular land use is either permitted, the subject of special-use proceedings, or barred. Density, lot area coverage, parking, and loading requirements differ in each district. Even when the proposed development is to be placed on a large site or on property that is and has been vacant for some time, the zoning constraints at the given location must be considered. Similarly, the zoning of adjacent sites is important. Not only will the person or body that regulates development test the proposed building program against the zoning standards of the larger area, but the ordinance also may place special constraints on neighboring developments under certain conditions.

It is important to note that the City of Chicago now maintains the updated zoning maps on its website and does not publish hard copies. See <http://maps.cityofchicago.org/website/zoning/index.html>. The official version of the zoning ordinance's text is now published in loose-leaf format by American Legal Publishing Corporation and includes quarterly updates. Finally, the 2009 edition of the Chicago Zoning Ordinance published by Index Publishing Corporation does contain zoning maps and includes an online service that is updated monthly.

3. [10.4] Site Constraints

Familiarity with the site of the proposed development is fundamental. Natural or man-made barriers on or adjacent to the property may appear on a site plan, but their impact on development cannot be gauged without an on-site inspection. Similarly, traffic patterns, entrance and exit opportunities, and interrelationships with nearby uses require a familiarity with actual conditions. It is only in the field that one can truly grasp the impact that landmarked structures, environmental conditions, or traffic patterns may have on the proposed development and, consequently, on the regulatory process.

It is also important to assess the geographic area of the development site to determine the existence and extent of any organized community groups. Although not physical constraints, such groups likely will play a significant role in the development approval process. The citywide influence of such groups has grown in recent years, and the trend continues in that direction. This is partly due to the election of several "populist" aldermen in city wards in which significant development activity occurs. A number of these aldermen included greater scrutiny of development projects among the central themes of their campaigns, and experience indicates that all are fulfilling those commitments. The influence of organized community groups in those areas is therefore proportionately greater. As a result, it is more important than ever to identify the group or groups that operate in the area of a development site early in the process, determine the issues of greatest concern to them, and present the proposed development to group representatives with those issues in mind. These dynamics are discussed more fully in §10.16 below.

B. [10.5] Choice of Remedies or Relief

Having gained an understanding of the development program in a zoning context, it is possible to determine what, if any, relief from the zoning requirements at the site must be sought if the development is to go forward. The fortunate developer will find that his or her project may be built at a particular site as a matter of right. Those developments able to be built as a matter of right under the 2004 Chicago Zoning Ordinance have become fewer in number as a result of the greater discretion given to government decision makers, such as the ability to grant or deny floor area ratio bonuses previously available as a matter of right or the need to obtain aldermanic approval for ancillary project elements such as sidewalk planters. In other cases, limited changes to a proposed development will bring it into compliance with all zoning standards — a more economical and less time-consuming approach than seeking regulatory relief for the desired program.

Some developers choose to avoid the regulatory process for no other reason than an aversion to seeking government approvals. In other cases, the potential for success — or, perhaps more precisely stated, the possibility that the request will be denied — will cause the developer to forsake an effort to seek relief. In the greater number of instances, however, particularly if the proposal is of significant size, a development program does not have the luxury of avoiding the regulatory process. It then becomes necessary to determine the appropriate zoning relief required to meet the needs of the project.

1. [10.6] Appeals

The decision of a zoning official that would foreclose development may be overturned by successfully appealing directly to the Chicago Zoning Board of Appeals. This avenue of zoning relief is available if a developer believes that a zoning official has misapplied the zoning ordinance to the facts at hand. The appeal process also may be used to establish rights to prior existing nonconforming uses or permitted substitutions of use. In this context, the Board acts in a quasi-judicial role, hearing evidence as in a courtroom and then applying the ordinance to the facts as it discerns them.

2. [10.7] Variations

The Zoning Board of Appeals is also the appropriate forum in which to request a variation from a requirement of the zoning ordinance. The Chicago Zoning Ordinance delineates a narrow range of variations that may be granted by the Board. For example, a request for parking relief is within the Board's jurisdiction but only to a given percentage of the required parking. Similarly, the Board may permit lot coverage to be increased, but again only within limited parameters.

3. [10.8] Special Uses

Certain land uses may not be permitted in a particular zone as a matter of right but may be allowed on examination of the proposal by the Chicago Zoning Board of Appeals under its power to grant variations in the nature of a special use. Land uses that may be sanctioned after these reviews, or "special uses" as they are commonly known, are specifically identified for each

zoning district. The special-use process is the most complex Board proceeding, which reflects the sensitivity of many of the issues presented in these hearings (*e.g.*, shall a halfway house be established in a residential zone, a church in a business district, or a sanitary landfill in a manufacturing area).

These matters can become quite adversarial, with neighbors and community organizations sometimes appearing in opposition and represented by counsel. Therefore, the proceedings often resemble courtroom hearings. Cross-examination of witnesses is permitted. Opposing experts are called on to support each side of the issue presented. The Board's discretion in these matters is quite broad.

4. [10.9] Administrative Adjustments (Exceptions)

In recent years, the Chicago Zoning Ordinance has been amended to offer zoning relief in neighborhood settings by making an application to the Zoning Administrator. This relief is limited, and its success is heavily dependent on agreement to the requested relief by the immediately affected (*i.e.*, adjacent) property owners. The alderman's approval also is critical. In the 2004 Chicago Zoning Ordinance, the "administrative adjustment" process is substantially broadened over the "exception" process added to the former code in its last years. The administrative adjustment process was intended to provide greater flexibility and the opportunity to avoid a more formal process in a larger number of circumstances than the exception process.

Experience since the adoption of the 2004 Zoning Ordinance indicates that the administrative adjustment process has become nearly as time-consuming as the more formal variation process before the Zoning Board of Appeals. Also, in the case of new developments, the ordinance provides that any project requiring more than two adjustments, such as a residential building needing relief from both side yard requirements and the rear yard requirement, must proceed as a variation before the Zoning Board of Appeals. Chicago Zoning Ordinance §17-13-1002. Finally, department policy now requires all applicants for administrative adjustments to obtain letters of support from their respective aldermen. Thus, actual time saved in the approval process and the number of situations in which this avenue of relief may be pursued have not been equal to expectations.

5. [10.10] Amendments to the Zoning Ordinance

Frequently, a development plan necessitates more fundamental changes in zoning than may be achieved through the appeal, variation, special-use, or administrative adjustment procedures. In these situations, rezoning of the property is necessary. This type of proceeding takes the petitioner into the legislative arena, with all of its vagaries and potential pitfalls.

a. [10.11] Map Amendment

A simple rezoning, or map amendment, is an amendment to the comprehensive zoning ordinance that changes the zoning classification of the site in question. The change may be necessary to permit a use that is prohibited in the district applicable to the site or to accommodate

greater density. In Chicago, the alderman of the ward in which the proposed development is located has, in reality, the power to permit or deny a map amendment — the tradition being that the other 49 aldermen will defer to the will of the local alderman.

With regard to increased density, and as mentioned in §10.1 above, the city is now using the zoning process as a vehicle to advance the policy goal of creating affordable housing units. Section 17-4-1004-D of the Chicago Zoning Ordinance and the city's Affordable Requirements Ordinance (ARO) impose affordable housing requirements on developers of residential buildings in certain cases. Section 17-4-1004-D, which applies to downtown (or "D") zoning districts, provides that when a property is rezoned to a district having a higher floor area ratio and subsequently improved with a residential building, 25 percent of the additional floor area gained by the rezoning must be improved with affordable residential units. A payment may be made into the Chicago Affordable Housing Opportunity Fund in lieu of actually providing the units using the formula for calculation of the affordable housing FAR bonus.

The ARO takes this concept further by imposing a citywide affordable unit requirement of 10 percent of the total number of units developed for projects containing 10 or more units, or a payment in lieu of \$100,000 per unit, when

1. property is rezoned to a district with a higher FAR;
2. property is rezoned from a district not permitting residential use to a district permitting it;
3. property is rezoned from a district not permitting ground floor residential use to a district permitting it and such ground floor residential use is established; or
4. property is sold to the developer of a residential project by the city.

This 10-percent affordable housing requirement doubles when the developer also receives financial assistance from the city for the project. For developments described in items 1, 2, or 3 above and also subject to §17-4-1004-D, the developer may elect to meet the affordable housing requirements of that section instead of the ARO. Finally, downtown residential developments qualifying for the affordable housing FAR bonus and processed as planned developments are subject to the ARO's 10-percent requirement even if they receive no financial assistance and do not meet any of the criteria described in items 1 through 4 above, although, as currently written, the purchase of *any* amount of bonus FAR pursuant to the affordable housing FAR bonus provisions satisfies the ARO requirement. As is evident, these requirements can have a profound impact on the economics of a particular development proposal.

b. [10.12] Text Amendments

Map amendments, or alterations to that part of the zoning ordinance that delineates zoning districts, are relatively commonplace. See §10.11 above. In contrast, gaining zoning relief through an amendment of the zoning ordinance text is a remedy often ignored by developers and their lawyers. Even as properties may be removed from one zoning classification and placed into another, the text of the zoning ordinance may be amended to permit uses to be established in districts that previously had barred the activities.

The ramifications of a text amendment are potentially greater than those of a map amendment. Whereas a map amendment focuses only on the specific property at issue, the very nature of a text amendment is to affect all property in the zoning district or districts whose regulations have been modified. The concern of the government regulator is that, although it may be reasonable to include a given use in a zoning district at one location, that same use may be inappropriate in another area of the city that is similarly zoned. This relief is therefore more difficult to obtain.

6. [10.13] Planned Developments — Optional and Required

The most versatile remedy available to the developer seeking to build a particular program is the planned development. Planned developments are rezonings, but they are so individualized as to enable a specific project to be constructed without regard for the constraints of a traditional zoning district. This customized zoning is in reality a negotiated zoning envelope for the site — a series of tradeoffs, the product of which is a development plan that meets the needs of the developer and satisfies the government's concerns for the particular location. The nature of these negotiations is discussed in §10.18 below.

The theory behind the planned development technique is to provide flexibility for projects of significant size and for which traditional zoning standards are inappropriate. The opportunity for the developer to use the planned development remedy is limited, however, by the parameters for planned developments set by the Chicago Zoning Ordinance. Moreover, even if a development meets the standards that will permit it to be processed as a planned development, the underlying zoning classification as well as neighboring zoning districts cannot be disregarded. A rational relationship between what is being requested and what is nearby must be shown. In addition, the Chicago Zoning Ordinance historically mandated that planned developments be in substantial compliance with the underlying zoning. The 2004 Chicago Zoning Ordinance introduced a refinement of this mandate and now requires that developments proposed as planned developments be in strict, as opposed to substantial, compliance with the underlying zoning district's maximum floor area ratio allowance. As a result, the only way to achieve a greater FAR than allowed in the underlying zoning district is through the use of FAR bonuses. These are available generally in the higher-density and downtown districts but, as noted in §10.5 above, must be requested and granted by the governing authority even if a development meets the requirements for the bonus and are no longer available as a matter of right. A list of available FAR bonuses and provisions concerning their application can be found in §17-4-1000, *et seq.*, of the Chicago Zoning Ordinance. These provisions include a bonus added in 2006 for contributions made to the Chicago Public School Capital Improvement Program. Chicago Zoning Ordinance §17-4-1023.

The planned development process also may be appropriate when circumstances require approvals from more than one agency of government. It is often possible to avoid multiple hearings before several city departments or boards by joining all the requests under the planned development umbrella. For instance, a development that requires additional density achievable only through a map amendment and a variation from traditional setbacks and includes uses that would be the subject of a special-use hearing might best be processed as a planned development, thus permitting all elements of the program to be reviewed in one proceeding.

The ordinance also mandates that the planned development process be invoked in certain situations, most often arising from the scale of the proposed development but, in certain instances, also to assure that certain types of uses be subjected to aldermanic scrutiny. A major change affecting the planned development process took place in November 2008 when the Department of Zoning and the land use section of the Department of Planning and Development were consolidated into a single agency known as the Department of Zoning and Land Use Planning. Previously, the planned development process was controlled by the Commissioner of Planning and Development, with the administration of the remainder of the zoning ordinance controlled by the Commissioner of the Department of Zoning (*i.e.*, the Zoning Administrator). With the 2008 departmental consolidation, control of all administrative processes, including the planned development process, rests with the Zoning Administrator, who is now the commissioner of the new department. Planning and development staff continue in their former roles with the new department.

The current trend in the administration of the planned development process is toward stricter conformity with all bulk regulations of the underlying zoning district, rather than just the FAR provisions as mandated by the zoning ordinance. Also, much greater specificity is being required in the text and drawing exhibits of a planned development ordinance. Unfortunately, this trend results in a significant reduction in the flexibility that traditionally has been the hallmark of the planned development process.

Whether the planned development process is instituted at the option of the developer or because it is required by the zoning ordinance, the procedure to be followed is the same. The parameters of the development are negotiated with the Department of Zoning and Land Use Planning, which considers, among other things, the views of community or special-interest groups. These groups often hold their own hearings on the proposed project and themselves engage in negotiations with the developer. Thereafter, a hearing is held before the Chicago Plan Commission, which in turn makes a recommendation to the City Council. As in the issue of map changes, the local alderman's recommendation as to passage is followed except in the most unusual circumstances.

C. The Application for Relief or Approval

1. [10.14] Necessity of Asking for All Relief

Although there is a great deal of emphasis placed on the public hearing aspect of the zoning approval process, all too often the underlying application for relief is given insufficient attention. Yet after the opposition of neighbors is forgotten, the renderings are put in storage, and the concerns of the public regulators are met, the details and parameters of the application, which are the basis for the relief granted, are the standard against which the proposed development is measured.

The need for flexibility also must be considered. Reasonably remote yet potential needs should be addressed. Failure to do so may mean reopening the approval process at a later date. This is because regulatory officials have limited jurisdiction to alter by the exercise of

administrative discretion the orders or ordinances that are the product of the zoning process. Unwitting failure to include all the elements necessary to the development program in the initial petition to municipal authorities, therefore, is not only embarrassing but also can cause long and expensive delays in the commencement of construction.

2. [10.15] Notice Letter

The initial documentation that accompanies a request for relief or approval of a development invariably includes a letter notifying neighboring property owners of the government approvals being sought. Often treated casually, it may be the most important document in the entire proceeding. If written well, it can be a useful tool in explaining the program to be undertaken. If poorly written, it can do great harm, as it may give rise to false impressions among those who receive it that will be difficult or even impossible to ameliorate during the pendency of the approval process.

Notice letters are required by the Chicago Zoning Ordinance to advise the recipient of the nature of the relief requested, by whom that relief is being sought, and that the relief is being sought by an application filed with the appropriate city agency. To limit this letter to the minimum required by law predictably will cause its recipients to believe that their worst fears will come to fruition if the relief is granted. A careful explanation of what is contemplated for the site and the limited nature of the government action being requested is mandatory if an immediate negative reaction is to be avoided. The notice letter, when used in this manner, can become a positive element in the developer's effort to gain support from neighboring property owners.

D. [10.16] Strategies for Gaining Support

Once the basic development plan is established and a decision is reached concerning the remedy to be sought, the development team must decide on a systematic approach to regulatory officials and others who will have an impact on the ultimate disposition of the developer's petition for municipal action.

To the extent possible, early identification of the interested parties to any zoning proceeding is of critical importance. In addition to the municipal officials charged with responsibility for the regulatory process as it relates to development, neighboring land owners, local political and community leaders, special-interest groups, and at times the media must be considered to have a potential role in the decision process. There is no simple, textbook approach to these groups that can be utilized in all cases. Each matter will require its own individual strategy. In complex situations, early and informal meetings with the local alderman and executive branch decision-makers and their staffs can be a valuable first step, if only to avoid wasting the time of others with a proposal or approach to a problem that, for reasons heretofore known only to municipal officials, will be unacceptable to them. Taking the development program to all interested parties as contemporaneously and as early as possible is typically the wisest course. Perhaps in recognition of these factors, department policy now requires the development team to schedule a pre-application meeting with the department's planning and zoning staff.

The purposes served by approaching these parties vary as greatly as do the targets of this attention. An early presentation to the staffs of the ultimate decision-makers will lead to a prompt appraisal of the project's chances for success, elicit comments about specific concerns, and determine quickly what, if any, tradeoffs will be necessary.

Because a project's neighbors are affected most directly by any zoning change, their sentiments are given great credence by those charged with granting or denying relief. Early exposure of nearby property owners to that which is being requested will avoid reaction prompted by the fear of the unknown and give the developer the opportunity to assuage fears or respond to legitimate concerns. If these advance glimpses of the program are presented thoughtfully, the development's future neighbors can be important allies. The failure to do so can create difficult opponents.

The alderman of the ward in which the site is located is less likely to become an immediate supporter as a result of an early effort to apprise him or her of a development program than to become an opponent as a result of the failure to promptly advise him or her of the development plan. It should be remembered that politicians react unkindly to being surprised or, worse yet, to being — in their own estimation — slighted. It is most advantageous to brief local government officials before engaging in any activity (particularly sending out the notice letter) that will cause their constituents to find them unaware of a plan to build in the area they represent. Working with the alderman toward an amicable agreement on all aspects of a development is mandatory given the degree of control the aldermen have over land use decisions in Chicago.

These outreach efforts within the community should not be seen as merely defensive tactics. Early disclosure of plans will do more than allay fears. In most circumstances, a thoughtful development plan will be accepted and supported by the alderman and open-minded community groups. True, not all groups react in a reasoned manner even as all plans are not sensitive to their environs. Developers make a mistake, however, if they presume opposition and fail to seek out support from neighboring property owners and community leaders.

Certain special-interest groups, especially those that focus on a single issue, present a different set of problems. These groups will have no property interests in an area as do neighborhood community groups, so their positions are taken without consideration of local conditions or, indeed, without concern about the future of the area in which the development is proposed. These groups may have preconceived goals that allow for little or no compromise. Often citywide in their self-delineated scope of activities, they may have no knowledge of, or interest in, local considerations. Their agendas also may be set without regard for broader civic interests. If their principal goal is "no growth," "low density," or "anti-high-rise," it will be difficult to persuade their leaders that a development that challenges these basic premises has any virtues. Yet these groups cannot be overlooked. Mitigation of their opposition may reduce the level of acrimony about a project, allowing more rational voices to be heard. If slighted, their mild disagreement may harden into formal, organized opposition.

Other interest groups may, indeed, present opportunities for a developer. These groups may have as their concern a particular aspect of municipal life. They may be protectors of parks, waterways, landmarks, or the geographic area in which a construction program is proposed.

