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20 Zoning Issues: A Developer's Perspective

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I. [20.1] INTRODUCTION

In a time of growing public awareness of environmental quality-of-life and transparency issues, land-use projects are coming under increasing scrutiny. Complex government regulations impact deadlines and budgets in virtually every new development effort. The prudent developer must be aware of the myriad issues that he or she will confront during the entitlement process. This chapter is an attempt to provide the developer and the developer's counsel with some general guidance with respect to the zoning approval process.

II. ZONING PROCESS

A. [20.2] Significance of Location

Zoning ordinances typically will reflect the philosophical bent of the officials that promulgated them. The focus of an ordinance will be consistent with the policies that drive zoning decisions in the particular jurisdiction, which, of course, will differ depending on the locale. Is a municipality in growth mode, or is it a mature community? In an area that has experienced development over many years, control of development, particularly the design of what is to be built, is often the hallmark of zoning regulation. Alternatively, new communities or communities seeking revitalization may have a more relaxed approach to development. Thus, the first questions one must ask involve where the development is located and what the local zoning ordinance reveals about the municipality's attitude toward development.

B. Analyzing the Development

1. [20.3] Scope of the Building Program

The need to ascertain the nature of the proposed use and the density of the development are threshold issues in any zoning matter. A zoning ordinance typically distinguishes between related yet different types of residential uses (*e.g.*, apartments, group living arrangements, transient hotels), business establishments (*e.g.*, restaurants, taverns, night clubs), and commercial and manufacturing facilities (*e.g.*, factories, forges). It is therefore necessary to know precisely what uses are to be established at the site. Density — defined both as floor area ratio (FAR), which is the common measure of development potential in most zoning codes, and the number of permitted dwelling units in a residential development — is of paramount importance to both the developer and the regulator. For the developer, it is an essential element of the potential economic success of the development. To the regulator, density is not only a measure of intensity of development but also a standard by which to compare the building program with others nearby.

Analysis of the development plan must also focus on the size, configuration, and placement of the proposed structure 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. Most zoning ordinances also impose height limitations and set standards for parking, loading, and signage.

2. [20.4] Understanding the 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 can be permitted, subject to special- or conditional-use proceedings, or barred. Density, lot area coverage, parking, loading, and signage requirements differ in each district. A determination must be made as to whether the proposed plan conforms to the parameters of the zoning district. 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 may also place special constraints on neighboring developments under certain conditions.

3. [20.5] Site Constraints

Familiarity with the site of the proposed development is fundamental. The impact of natural or manmade conditions on or adjacent to the property cannot be gauged without an onsite 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 the developer 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. Once these site constraints, if any, have been analyzed, the development team can determine whether additional studies, such as traffic or shadow, are needed.

C. [20.6] 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. Some projects may be built at a particular site as a matter of right. In other cases, it may be appropriate to make limited changes to a proposed development to bring it into compliance with all zoning standards — saving money and time when compared to seeking regulatory relief for the desired program.

Some developers choose to avoid the regulatory process for no reason other than an aversion to seeking government approvals. In other cases, the possibility that the request will be denied will cause the developer to forsake an effort to seek relief. In many 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.

This chapter does not try to discuss all of the possible types of relief that may be sought but highlights in §§20.7 – 20.12 below avenues frequently used to achieve the developer's goals.

1. [20.7] Variations

Depending on the municipality, the zoning board of appeals is the appropriate forum in which to request a variation from a requirement of a zoning ordinance. Typically, a zoning ordinance

will delineate a narrow range of variations that may be granted by the ruling body. For example, under the Chicago Zoning Ordinance, a request for parking relief is within the Zoning Board's jurisdiction but only to a stated percentage of the required parking. Similarly, the Board may permit lot coverage to be increased but, again, only within limited parameters.

Typically, a zoning board will not approve a variation unless it finds that, based on the evidence presented to it in each specific case, strict compliance with the regulations and standards of its zoning ordinance would create practical difficulties or particular hardships for the subject property and the requested variation is consistent with the stated purpose and intent of the ordinance.

In Chicago, in order to determine that practical difficulties or particular hardships exist, the Zoning Board of Appeals requires evidence of each of the following:

a. The property in question cannot yield a reasonable return if permitted to be used only in accordance with the standards of the Zoning Ordinance.

b. The practical difficulties or particular hardships are due to unique circumstances and are not generally applicable to other similarly situated property.

c. The variation, if granted, will not alter the essential character of the area.

2. [20.8] Special Uses

Certain land uses may not be permitted in a particular zoning district as a matter of right but may be allowed upon examination of the proposal by a zoning board under its power to grant special or conditional uses. Land uses that may be sanctioned after these reviews usually are specifically identified for each zoning district. Special or conditional uses require case-by-case review in order to determine whether they will be compatible with surrounding uses and development patterns. This review is intended to ensure consideration of the special use's anticipated land use, site design, and operational impacts. The special-use process is often a complex proceeding that reflects the sensitivity of many of the issues presented in these hearings. For example, shall a halfway house be established in a residential zone, a church in a business district, or a sanitary landfill in a manufacturing area?

The ruling authority typically considers a range of criteria when evaluating a special or conditional use:

a. Is the use in the interest of the public convenience?

b. Will the use have a significant adverse impact on the general welfare of the neighborhood or community?

c. Is the use compatible with the character of the surrounding area in terms of site planning, building scale, operating characteristics such as hours of operation and traffic generation, and project design?

d. Will the use, if granted, cause substantial injury to other property in the area?

These matters can become quite adversarial, with neighbors and community organizations often appearing in opposition and represented by counsel. Cross-examination of witnesses is permitted. Opposing experts are called on to support each side of the arguments presented. The discretion of the zoning board in these matters is quite broad.

3. [20.9] Amendments to the Zoning Ordinance

Frequently, a development plan necessitates more fundamental changes in zoning than may be achieved through variation or special-use 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. [20.10] 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. Which new district is appropriate will, of course, be dependent on an analysis of the requirements of the new district relative to the use proposed for the site. For example, if a mid-rise residential development is proposed within a district currently zoned for manufacturing, a map amendment will be required to rezone the site from its current manufacturing designation to a residential district that accommodates multifamily development. The government approval process will vary depending on the locale. In Chicago, for example, 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.

b. [20.11] Text Amendment

While map amendments, or alterations to the part of the zoning ordinance that delineates zoning districts, are relatively commonplace, 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 had previously barred such activities.

The ramifications of a text amendment are potentially greater than that 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, the same use may be inappropriate in another area of the city that is similarly zoned. Although it should be considered, this relief is therefore more difficult to obtain.

4. [20.12] Planned Developments

The most versatile remedy available to the developer seeking to build a particular project is the planned development. Planned developments are rezonings, but they are so individualized as to enable a specific project to be constructed without regard to 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 §20.17 below.

Planned development regulations are designed to ensure adequate public review of major development proposals. These regulations also encourage unified planning and development that promotes economic and efficient land-use and development patterns, improved levels of amenities, appropriate and harmonious variety in physical development, creative design, and a beneficial environment.

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 usually limited, however, by the parameters for planned developments set by the municipality's 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 of the district as well as neighboring zoning districts cannot be disregarded. A rational relationship between what is being requested and what is nearby must ordinarily be shown. In addition, a zoning ordinance typically will mandate that the planned development be in substantial compliance with the underlying zoning and will sometimes require strict compliance with a particular parameter of the underlying zoning district, such as floor area ratio.

Use of the planned development process often is efficient if a project otherwise cannot comply with the requirements of a particular zoning district or if multiple zoning entitlements are required from a number of government agencies. For instance, a development that requires additional density achievable only through a map amendment and a variation from traditional setbacks and that 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 a single, comprehensive proceeding.

The developer should expect greater scrutiny of the corporate structure and any relations with government officials as part of the application process. Requirements designed to increase the transparency of the development entity or applicant (and the property owner, if different from the applicant) are becoming commonplace. These rules can be burdensome and may infringe on the privacy desires of the developer and its officers, directors, and investors. Failure to comply with these requirements, however, can result in delays in the entitlement process.

D. The Application for Relief or Approval

1. [20.13] 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, not only is embarrassing but also can cause long and expensive delays in the commencement of construction.

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2. [20.14] 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. Some jurisdictions take on the responsibility of notifying surrounding property owners. If the developer is required to send the notice, it should not be treated casually. If written well, the notice letter 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 the nearby property owners who receive it that will be difficult or even impossible to ameliorate during the pendency of the approval process.

Zoning regulations typically require that a notice letter advise the recipient of the nature of the relief requested, by whom the 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.

E. [20.15] 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 political leaders 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.

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. Indeed, many jurisdictions require what is commonly referred to as "pre-application meetings."

Because a project's neighbors are most directly affected by any zoning change, their sentiments are given great consideration 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 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 thoughtfully presented, the development's future neighbors can be important allies. The failure to do so can create difficult opponents.

Although political leaders may not become immediate supporters as a result of an early effort to apprise them of a development program, it is far more likely that they will become opponents as a result of the failure to advise them promptly of a new development proposal in their jurisdiction. 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 relevant political leader toward an amicable agreement on all aspects of a development is highly recommended. Indeed, in Chicago, it is mandatory, given the degree of control the aldermen have over land-use decisions in their respective wards.

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 local political leader and open-minded community groups or neighbors. True, not all groups or individuals 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.

The more local the interest group, the more effective it will be in any zoning proceeding that involves the legislative process. This is because of the importance of the local political leader in the zoning process. Typically, the developer is an outsider or is viewed as one; the community spokesperson is the politician's constituent.

Certain special-interest groups, especially those that focus on a single issue, present a different set of problems. These groups have no property interests in an area as do neighborhood community groups, so their positions are taken without consideration of local conditions or, indeed, 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 may also be set without regard to 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 indeed may 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. Seeking to come to a meeting of minds with these groups serves two purposes. If agreement can be reached between the proponents of a development and groups that otherwise might be critical of it, the government agency vested with authority over the approval process will find it easier to grant the relief sought. Further, the developer may find that he or she can improve the desired program by accepting limited changes proposed by these groups or at least offering modifications to the original plans in response to certain of the reasonable suggestions made. These groups often include among their membership people of significant expertise and skill. Their review may yield ideas that were not previously considered but that are constructive and an improvement to the proffered plan.

It is possible to cause interest groups to become allies and therefore advocates of a development program. An effort at accommodation, even if it does not win converts, may ameliorate the intensity of opposition or win a measure of goodwill by virtue of the developer's initiation of discussions. An unwillingness to exchange ideas with these groups will be seen by government officials as intransigence and disdain for the public process. At the very least, a developer who can stand before a city board, commission, or legislative body and state that the proposal has been reviewed with concerned civic groups, regardless of whether any organization's suggestions have been adopted, will likely receive a more sympathetic hearing than a developer who refuses to meet with or consider the comments of these groups.

1. [20.16] The Media

An analysis of interaction with the community would not be complete without mention of the role of the media in the development process. In most cases, citywide newspapers and television stations play no role. Neighborhood periodicals, however, almost universally report and comment on any development programs within their coverage areas. As is the case with community groups, local newspaper support can be advantageous. Effective communication with reporters for these periodicals (and, at times, their editorial boards) can be of great assistance in positioning what is to be built in its best light and correcting misunderstandings or misconceptions that might arise during the pendency of the approval process. If neighboring property owners or interested civic groups are in support of a project, that too can be brought to the attention of both other citizens and government officials through local media.

Certain development plans are of such a scope or proposed at locations so visible as to become a focus of interest for an entire municipality. These situations are predictable and call for a media program to be designed to announce and explain the development. Press contacts should not be limited to those who write about urban affairs. Architectural writers often are interested in these projects, and political reporters cannot be overlooked as the ultimate decision in many zoning matters rests with both the legislative and executive branches of government, each of which is sensitive to public attitudes. Finally, in those few instances in which a development becomes the subject of significant policy debate, soliciting and obtaining editorial board support can be of substantial import in gaining favorable government action.

It should be noted that if and when a development program becomes of interest to the media, both sides of the debate will have an opportunity to take their cases to the public. The developer must be not only ready to tell its story but also able to defend against the criticisms leveled by opponents. A skillful marshaling of facts and expert opinion as well as an ability to focus on the issues the media will deem important are critical. The assistance of public relations counsel in these situations, both to structure media programs and to execute them, is often warranted.

2. [20.17] Negotiations

As noted in §20.15 above, negotiations are often a part of the regulatory process. The parties to any negotiation are several. A planning department is usually the city's negotiating arm. Neighboring property owners, community and special-interest groups, and local political leaders also become part of the process. Numerous issues may be the subject of the interplay between the developer seeking to build the project and the government body seeking to establish limits, implement certain public policy goals, and mediate conflicts between the proponents and opponents of the development plan.

Use and density (including the number of residential units and the parking necessary to accommodate them) are the elements of the development plan most likely to create controversy and therefore most commonly the subject of negotiation. Also critical are traffic-related issues, such as traffic circulation, ingress and egress patterns as they relate to on-site parking, and the number and placement of loading docks; landscaping issues; environmental conditions; signage

issues; issues surrounding hours of operation; and height issues (often camouflaged as a density issue in circumstances in which no height limitation is imposed by the ordinance). Design is an overriding concern and often the focal point of these deliberations.

A concern in any negotiation is that the accommodation with the public be one that does not jeopardize the economic viability of the building program. It is not an overstatement to say that in most cases the developer's economic plight will generate little sympathy from either the project's critics or government regulators. In these instances, the developer's reputation becomes as critical as its ability to marshal credible arguments on behalf of the proposed development program. Negotiation sessions may resemble mini-hearings. The developer often will wish to include experts, previously retained as hearing witnesses, to express opinions on technical elements of the proposed development program and to support the suitability of the plan proposed.

The negotiation process has increasingly become a vehicle for the attainment of current public policy goals by government regulators. These goals often involve the provision of building features, such as "green" roofs, or elements affecting the character of the proposed development, such as the provision of affordable housing units in a residential development. In both examples, satisfaction of the public policy goals has a financial impact on a project that can be quite significant. In some cases, such as the affordable housing example, additional density in the form of floor area or dwelling units may be granted in exchange for the satisfaction of the public policy goal, thereby providing some financial return to offset the cost of satisfying the goal. In others, however, such as the "green" roof example, no additional development rights are forthcoming, and satisfaction of the public policy goal simply results in additional project costs with no corresponding financial benefit to the developer. It is therefore of critical importance that a developer become familiar with the current public policy goals in a particular jurisdiction in order to gauge the potential impact that satisfaction of any or all such goals will have on the proposed development.

Whatever the subject matter of the negotiations, the developer must determine how much flexibility he or she has and what aspects of the proposal may be modified. Should the negotiations become too burdensome, the developer may choose to limit the development to that which may be built as a matter of right under the existing zoning at the site. If the program the developer has contemplated for the site cannot be adjusted so as to be built as a matter of right and community opposition or proposed government limitations become too burdensome, there may be no alternative but to abandon the development plan.

3. [20.18] Presentation

Successful negotiation of the parameters of a development program with the community and local leaders in most cases will mean success before the decision-making agency. However, the decision-making body cannot be taken for granted. Moreover, even if most objectors have been mollified, there is always the possibility that there will still be objectors who are willing and able to bring suit to overturn the government body's decision. For all of these reasons, it is imperative that the formal record made at the public hearing before the regulatory authorities be complete and persuasive. Any presentation that does not contemplate the possibility that the relief sought will subsequently be challenged in a court of law risks judicial reversal.

A well-crafted presentation should outline the relief being sought clearly and definitively. The development must be placed before the hearing panel in sufficient detail to permit the decision makers to have a complete understanding of what is proposed for the site. Any unique elements of the plan should be set forth, and the program should be defined in the context of neighboring developments. Hearing officials should be made aware of all the essential elements of the site, the development plan, and its environs. The nature of the approvals sought should be delineated clearly. It is equally important to advise the decision-making panel of those aspects of the development that meet the standards of the zoning district and, therefore, are not the subject of the proceeding.

The presentation must address the elements of the plan that are at issue. These disputed points are often technical in nature and require expert testimony. It is important to determine what these issues will be in the early stages of preparation and to retain the appropriate witnesses to address them. At the hearing, these witnesses should be called on to testify, thereby using their technical expertise as the basis for gaining the relief sought.

The subject of expert witness testimony relevant to any individual case varies with each project. Some expert testimony is mandated by the standards imposed by the municipality's zoning ordinance. For instance, special-use standards frequently require a showing that the establishment of the use at a certain site will not have a significant adverse impact on the welfare of the neighborhood. Often, this standard will involve analysis of property values in the area. In Chicago, an appraisal witness must be retained to address this standard. Failure to prove this element of the case without such a witness will cause the application to be denied. Other typical standards require a showing that the development proposal is compatible with the character of the surrounding area in terms of site planning, building scale, project design, and operating characteristics. As these factors are within the expertise of urban planners and architects, such experts are used frequently to analyze the development proposal and offer testimony tending to show that these standards are met in the particular case.

On balance, it is useful to retain expert witnesses to opine, on the basis of their professional experiences and educational backgrounds, regarding the elements of the development plan that are in dispute. Unlike self-serving evidence presented by the developer, the developer's architect, or the developer's lawyer, a well-credentialed expert witness will not only supplement and buttress a developer's view of matters in dispute but also can provide an independent analysis on which the regulators can base their decision. In fact, in many instances, a regulatory body will recognize only the testimony of experts and not the statements of the developer's counsel. If the zoning decision is challenged in court, expert testimony will be given appropriate weight by a court and will require opponents to provide similar testimony rather than rely on the objector's often subjective and narrow view of the circumstances at issue.

Finally, the presentation must be complete, but not so lengthy or burdensome as to provoke a negative reaction from those hearing the petition. The developer and the developer's agents and experts must focus on the matters at issue and communicate in a positive way the elements of the development plan on which a favorable decision is required. They also must be able to respond to the questions and criticisms from those making the decision as well as from opponents of the program.

III. [20.19] SUMMARY

In approaching the approval process, the developer must negotiate with government authorities to accommodate its needs as well as those of the public. A balance must be struck between economic requirements and the requirements of the municipality. The process is public, has many audiences, and is marked with a give and take that is sometimes rational but often intertwined with parochial and extraneous circumstances. Whatever the desired remedies, full disclosure, an understanding of the relevant procedures, knowledge of one's rights, and sensitivity to the public process must be combined if the required rights, licenses, privileges, and approvals are to be obtained.