INTRODUCTION

By now you have heard that the Michigan legislature has authorized what is generally referred to as “contract” or sometimes “conditional,” zoning. “Contract” zoning, for many years was considered an illegal practice, in that it was largely an agreement for rezoning in exchange for the acceptance of certain requirements and conditions related to the development of the property in question. The downfall of this procedure was the promise to rezone if the requirements were fulfilled, and in some instances, agreements not to change the zoning in the future.

“Conditional” rezoning was likewise a problem in that the municipality imposed certain conditions and requirements on the property owner as a precedent to rezoning. Over time, these terms (contract and conditional) have tended to become interchangeable.

The Michigan version of the authorization to enter into zoning agreements was introduced in September, 2004 and became effective early this year. It was implemented through amendments to the City and Village Zoning Act, the County Zoning Act and the Township Zoning Act. It enjoyed broad support from groups as diverse as the Michigan Municipal League, the Michigan Chamber of Commerce and the Michigan Environmental Council. Michigan is now one of more than twelve states where similar authorization for agreements between a property owner and a local unit of government specify conditions and terms of land development.

The amendments to the Zoning Acts are short, and leave open a number of questions. The basic authorization states:

An owner of land may voluntarily offer in writing, and the (applicable unit of government) may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.

As part of this agreement, the Acts allow or require:

- Setting a time frame during which the voluntary offers from the owner must be fulfilled.
- A requirement that should the offers not be fulfilled that the zoning reverts to the previous classification.
- A provision that prohibits the municipality from requiring an owner to offer conditions as a condition of the rezoning.
Zoning agreements can add a level of flexibility to the zoning process by providing the potential to account for some of the negative effects of rezoning. For example, rezoning denials are often based on the concern about allowing a wide range of uses, some of which could create problems for neighboring land uses. Other denials have been made because supporting infrastructure was not in place that would support the change in the intensity of uses allowed in the proposed new district.

However, the ability to enter into zoning agreements is not without its critics. Some argue that appropriate land use tools such as Planned Unit Development (PUD), special land uses, and site plan review are already in place to control land development and that contract zoning will result in a hodge-podge, “spot zoned” areas scattered throughout the community. Others fear that zoning agreements will encourage development that is inconsistent with a community’s master plan. Perhaps one of the most compelling concerns is that a community will bargain away its authority and in the end negotiated ad-hoc agreements will weaken zoning regulations that were intended to apply equally to all land and uses within a district.

Supporters of zoning agreements stress the greater predictability for local jurisdictions and neighbors because the conditions of land use, such as landscaping, building design and necessary utility improvements can be specifically tied to the rezoning. A development project that deviates from any aspect of the agreement cannot move forward and, in fact, will require the municipality to return the zoning to its former classification. They also note that because the owner must offer the conditions to be included in the agreement, that it can be a “win-win” for the community and the owner.

ISSUES

The newly adopted legislation raises numerous questions since it lacks detail, has not been widely implemented by local communities, or reflected in revised zoning ordinances, and has yet to be applied in a wide range of real world situations. As a result, some general guidance may be useful when addressing these issues, including looking to other states to determine how the practice of using zoning agreements has evolved.

Voluntary Offers

The Zoning Acts’ amendments require that conditions be voluntarily offered in writing by a property owner. Ideally, this offer should be provided with the initial application for rezoning. In practice, however, an applicant may not know what offers might be acceptable, or indeed, that an offer would be useful, until well into the application review process.

Some of this may be resolved with either formal or informal pre-application meetings, where concerns may be identified that the applicant may have the opportunity to address. Caution must be undertaken, even during these early stages, to make it clear that approval of a rezoning is not promised, even if an offer is made. Rather, the community may simply make its concerns clear regarding the potential effects of the proposed zoning
change. It is possible, and perhaps even likely, that an applicant would not be able to ease all of the community’s concerns regardless of the offered conditions.

At a minimum offers or revisions to offers should be submitted well before a public hearing to avoid confusion and inefficient meetings where exhaustive discussions occur with little time left to address substantive issues. It may be necessary to table a request so that the public and decision makers can be afforded the time to understand exactly what is being offered.

The ultimate test is that the applicant not be able to imply that the conditions were coerced, either directly or indirectly, or that promises of rezoning were made in exchange for the offer. While some degree of negotiation is inevitable, it must be a true negotiation, rather than an attempt by any party to coerce an agreement.

“Offers”

While there is a broad range of offers that may be considered by the community, it is clear that other states and their courts have insisted that the conditions offered cannot permit a land use or activity that would not otherwise be allowed in the new zoning district. For example, the zoning agreement could not allow a drive through window to be added to a restaurant where drive-through facilities were otherwise not permitted in the new district.

Similarly, the agreement should not be used to vary any of the requirements of the district, such as the number of parking spaces, signs, etc. The Zoning Board of Appeals must still address these issues. In addition, if a special land use approval is required for the use being considered as part of the agreement, that process must still be pursued.

The offered conditions must also be related to the rezoning itself. A clear potential for abuse will be offers from applicants to contribute to a community’s recreation programs, or offers to build new community facilities that have no connection to the application for rezoning. A community cannot put itself in a position where it appears as though an applicant has “bought” the rezoning.

So what can be offered, or more importantly, what could be accepted as part of a zoning agreement? While a complete listing is simply not possible, some examples may be useful.

- A community’s comprehensive plan notes that rezonings for high density residential uses will not be considered until public utilities are available to the property. The owner offers to extend public utilities to the site at his expense.

- Concerns about the small size of dwelling units allowed in the new district are expressed by neighboring property owners during a rezoning public hearing. The applicant offers to restrict the size of the homes to be consistent with those in the area.
A rezoning is requested from a residential to a commercial classification. Adjacent properties are zoned for residential use. The owner offers to install a landscape screen between the homes and the planned commercial uses where a landscaping requirement is otherwise not part of the current ordinance.

Some inappropriate conditions:

- The new district restricts buildings to a height of 35 feet. The applicant offers to increase the setback of the building in exchange for an increase in building height to 50 feet. (The agreement cannot permit something that would otherwise be prohibited in the new district.)

- As part of a rezoning request for a new commercial development, the owner offers to provide the community a cash payment to improve its park and recreation facilities. (The condition must bear some relationship to the rezoning under consideration.)

- The agreement includes a clause that prohibits the community from changing the zoning of the property at any time in the future. (The community cannot bargain away its zoning authority, or commit a future legislative body to a certain zoning.)

**Zoning Reversion**

The new legislation requires that unless the conditions of rezoning approval are met within a period of time specified by the local jurisdiction the land reverts back to the original zoning. Other states where conditional zoning is already valid have found that this provision is an important enforcement tool to control development and help guarantee the implementation of agreements.

Under Michigan’s new act, the meaning of reversion is unclear. For example, if the legislation stated that the zoning would “automatically” revert to the previous classification, it could have been interpreted that no formal action, such as public hearings or notices, would be necessary.

However, the language is not that clear. Courts in other areas of the country have found that a reversion actually constitutes a second rezoning. While it may require subsequent interpretation, our recommendation is that a formal rezoning process be followed. Therefore, in crafting a zoning text amendment to accommodate zoning agreements it is important to identify who, or what body initiates the reversion process (planning commission or the legislative body) and that all statutory procedures and requirements for public notice and a hearing are followed; not only for the initial zone change but, should it become necessary, for the reversion as well.

This same principle may also apply to later requests by a developer or subsequent land owner to amend an agreement. According to the Henrico County, Virginia zoning...
ordinance once conditions (in Virginia they are known as proffers) have been accepted by
the legislative body any changes require submitting an amendment request and a public
hearing before the Planning Commission and the Board of Supervisors. This process is
akin to a rezoning.

A unique situation that could arise is if a project is partially implemented and the
agreement is not completely fulfilled by the owner. In this instance, decisions may have
to be made as to whether to revert the entire property to the previous classification, or
only that portion that has not be implemented. If the entire property is reverted to the
previous zoning, it is likely that nonconforming uses, buildings or lots will be created.

CONTENTS OF THE AGREEMENT

Prior to entering into any agreement, it should be thoroughly reviewed by the
community’s planner, attorney, and other appropriate professionals, both for content as
well as legality. The agreement should cover a broad range of situations and leave as little
as possible to interpretation.

- The agreement should clearly state that it is to run with the land, and bind all
  future owners to its provisions. An executed copy should be recorded at the
  county register of deeds.

- When considering voluntary offers they must be clearly stated, avoiding vague
  terms or conditions. Check to see whether terms used in the agreement are
  already defined in the zoning ordinance and if they are, make sure there is
  agreement between those definitions; for example does a part of the agreement
  preserving open space include wetlands, or storm water management areas?

- To avoid attempts by property owners to exempt future development plan changes
  from complying with future code requirements, steer clear of language that ties a
  rezoning to zoning regulations or codes that exist at the time of approval.
  Although “locking in” development regulations may be permissible in some states
  where development agreements are permitted through state enabling legislation,
  Michigan currently lacks this authority.

- For public improvements, such as streets and utilities, make sure the construction
  schedule is clear and that it has a breakdown of costs and obligations; for example
  who is required to pay for engineering drawings, inspection fees, obtain permits
  and prepare as-built drawings? If other agencies are involved, such as a road, or
  drain commission, make sure the decision making process for final design
  approvals is clearly specified and get the agency involved in reviewing the offer
  early in the process. As an additional layer of protection, include submission of
  performance bonds or similar tools in the agreement to guarantee that
  infrastructure and road improvements committed to by a developer will in fact be
  made.
- Try not to re-invent the zoning ordinance in the agreement; rely on current ordinances for the details and just list the items that are part of the agreement.

- Finally, attach reduced plans and supporting documents to the agreement and make sure they are clearly referenced by title and date. In many instances, a site plan may be needed to clearly show the conditions included as part of the agreement.

REZONING EVALUATIONS

While zoning agreements may prove a useful tool in tailoring land development to individual sites and situations, they should not be used to avoid the fundamental planning principles upon which we rely to build strong communities. Accordingly, the ability to enter into zoning agreements should not be viewed as a panacea that cures all problems related to zoning. Instead, zoning agreements should be entered into only after careful consideration and deliberation.

Challenges to zoning changes associated with zoning agreements tend to indicate that courts generally use the same standards to test these “conditional rezonings” that are used for any rezoning. Consistency with the comprehensive plan, ensuring that the uses or activities covered by the agreement (and the subsequent rezoning) are compatible with the neighborhood, and other rezoning considerations are still valid.

Similar standards should apply to test the conditions or restrictions offered by a property owner: are they legal and reasonable; do they further general welfare; do they bear a relationship to the activity that results from the zone change; and are they proportional to potential impacts?

Unlike rezonings undertaken without agreements, it may be useful in some circumstances, where applicable, to include a site plan with the zoning agreement showing the elements of the agreement as a visual reference. This, however, does not replace the other site plan review requirements that may be imposed as part of the establishment of a new use. Other zoning requirements not covered by the agreement must still be met.

PROTECTION FROM SUBSEQUENT REZONINGS

The Michigan legislation stipulates that a local government cannot alter the provisions of the zoning agreement during a period of time specified in the agreement. Ostensibly this is meant to provide some level of protection for a landowner or developer by locking in the agreement provisions for at least some specified time. However, if conditions are not met during that period a local government has two choices; either extend the time frame, or, as noted earlier, initiate the process to return the zoning to its previous classification.

Although this “no tinkering” provision affords some protection it would not prevent a jurisdiction from rezoning a property to another district or changing code requirements.
The legislation is clear that only the agreement cannot be unilaterally altered and since a municipality does not have the authority to protect land from any future rezoning, a property owner who has received a desired rezoning may move quickly to establish vested rights.

IMPLEMENTING ZONING AGREEMENTS

Before taking any steps concerning zoning agreements, the community should first consider whether it wants to offer or participate in the process. The language of the amended Zoning Acts clearly states that the process is a voluntary one for both parties. Ultimately, the first choice will be the community’s as to whether or not they wish to take advantage of this new process.

Before attempting or accepting any offers to enter into a zoning agreement, the zoning ordinance should be amended to clearly outline the process and requirements. The amendment language of the Zoning Acts may act as a starting point for the ordinance language, covering the basics of offers, procedures for zoning reversions, etc. Since a zoning agreement is a voluntary process, the amendment will not replace the current procedures for a “normal” rezoning. Rather, the zoning agreement process should be written as a separate procedure. Make sure that an amendment process is included.

Application procedures should be put into place that clearly describe the process, from the point when an offer to enter into a zoning agreement is submitted, to the final step of recording of the agreement. Careful review by the community’s attorney and consultants must also be part of the process. Finally, staff and decision makers should also be made aware of these requirements, and the advantages, and the potential dangers for misuse and abuse, of zoning agreements.

CONCLUSION

The benefits of zoning agreements may off-set potential concerns as long as Michigan communities view this new tool as another option to add flexibility to land use decisions rather than as a substitute for traditional, sound zoning principles and practices. Based on the experiences of other states and the posture of courts any offers made by a property owner to condition rezoning must be carefully considered.

- The offer must be made voluntarily, it cannot bargain away a community’s ability to make future zoning decisions;
- The agreement must bear a reasonable relationship to the potential impacts that result from the rezoning, considering the general welfare rather than private interests;
- It must be consistent with a community’s comprehensive plan and be in harmony with the normal zoning plan for the area, and
- It must clearly state the restrictions that are proposed for the property.
Following these simple guidelines, along with the others mentioned above, can help make zoning agreements a useful tool toward making our communities better places to live and work.

Should you wish to have more information, or want us to provide ordinance language or other guidance, contact us in at:

LSL Planning, 15 Ionia SW, Suite 450, Grand Rapids, MI 49503; or 616-336-7750

Or,

LSL Planning, 306 S. Washington Ave., Suite 301, Royal Oak, MI 48067; or 248-586-0505