

# Who Are You Calling Arbitrary?

A Guide to Help Protect Your Land Use Decisions  
Without Inviting Lawsuits

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### INTRODUCTION

No one likes being sued. But just about every citizen who feels threatened by a new business, apartment complex, or subdivision development near their home vocally seeks the help of elected officials of their community to stop what is seen as the invasion of their neighborhood. As a result, the risk of a lawsuit always hovers over the resulting disputed, and often heated, governmental decision in a zoning or subdivision case.

After all, it is people's property being regulated, and the unfortunate climate of mistrust of government makes the risk even higher of someone taking the decision to court. Typically, the unhappy plaintiff will claim that the government's decision should be overturned for being "arbitrary and capricious."

So how can local officials make zoning and subdivision decisions that benefit the community without inviting lawsuits?

The title of this discussion is "**Who Are You Calling Arbitrary?**" Because this is the typical reaction of decision-makers who in good faith believe they have made the right decision, only to be surprised by allegations to the contrary in a lawsuit.

We start with the end in mind: Picturing the result you do not want to have happen, and ways to avoid it.

Because you do not want to have a court single out your city in an almost mocking manner in reversing a decision in a land use case. Which is what a Louisiana appellate court did in 2013 in a series of cases reversing the decisions of a particular Louisiana city in land use cases. In the third case, the court reversed the denial of a building site plan for an additional structure on the applicant's site when, the court felt, the city council made its decision solely in response to citizen pressure, even though the applicant's plan met all requirements of the zoning ordinance.

In lecturing the city, the court scolded:

**"Replacing long-term rationality with short-term expedience, i.e., looking at each situation on a purely ad hoc political basis, is no way to run Mayberry, much less . . . [the municipality]. . .**

**This arbitrary action of the . . . City Council** is contrary to law and adverse to our basic precepts of equal protection and due process. . .

We realize that our opinions can be pretty dry, but it would help if the . . . City Council would at least consider our rulings that involve the council, particularly when the alternative is to continually repeat the same mistakes in an endless political loop." (Emphasis added.)

WRW Properties, LLC v. City of [ ], 47, 657 (La. App. 2 Cir. 1/16/13), 112 So.3d 279 [Name of defendant city omitted].

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**Summary of Recommendations**

Our recommendation is to place zoning and subdivision decisions inside a protective 4-sided virtual box, whose sides are:

- **BE CLEAR**
- **LISTEN**
- **BE CONSISTENT**
- **GIVE YOUR REASONS (NOT YOUR PERSONAL OPINIONS)**



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*The discussion will start with some basics about zoning and subdivision regulations.*

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**ZONING BASICS**

**A. What Is Zoning?**

Zoning is the legal division by local government of the community into districts, or zones, for the regulation of land use activity in each district.

Zoning regulations are aimed at three major activities:

- Permitted uses of land and buildings in each district,
- The intensity or density of the permitted uses in each district,
- The maximum height and minimum setbacks (called the “building envelope”) of structures built on a site. (See Ch. 14, “Zoning and Subdivision Regulations,” *The Practice of Local Government Planning*, Third Edition, Charles J. Hoch, Editor, International City/County Management Association, 2000.)

**B. How Long Has Zoning Law Been in Place?**

The first modern, comprehensive zoning ordinance was enacted by New York City in 1916. It was designed to separate resident uses from more intensive uses, such as industries, to provide safer, quieter areas for family life.

By 1921, half of the state legislatures in the United States had adopted zoning enabling acts, allowing their municipalities to adopt and enforce zoning ordinances. This popularity encouraged the U. S. Department of Commerce to publish in 1924 the first version of the Standard State Zoning Enabling Act, with a final version published in 1926.

It was this final version of the Standard State Zoning Enabling Act that Louisiana adopted in 1926 as **La. R.S. 33:4721 et seq.** At least 43 other states did the same. 1926 also was the year that the U. S. Supreme Court upheld municipal zoning in the landmark case of Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). (See Sec. 2.7, Juergensmeyer and Roberts, *Land Use Planning and Development Regulation Law*, Practitioner Treatise Series, Thomson West, 2007.)

Therefore, given the adoption of the Standard State Zoning Enabling Act across America, there is useful case law guidance available to assist courts in zoning questions. However, Louisiana courts, as in other cases, rarely look beyond the Louisiana Constitution and Louisiana statutes, ordinances, and court decisions in deciding zoning disputes.

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### C. What is the First Step for a Louisiana Community that Wants to Enact a Zoning Ordinance?

The first step in enacting a zoning ordinance is for a Louisiana municipality's board of aldermen or city council to appoint a zoning commission made of up 5 – 9 citizens. La. R.S. 33:4726.A.

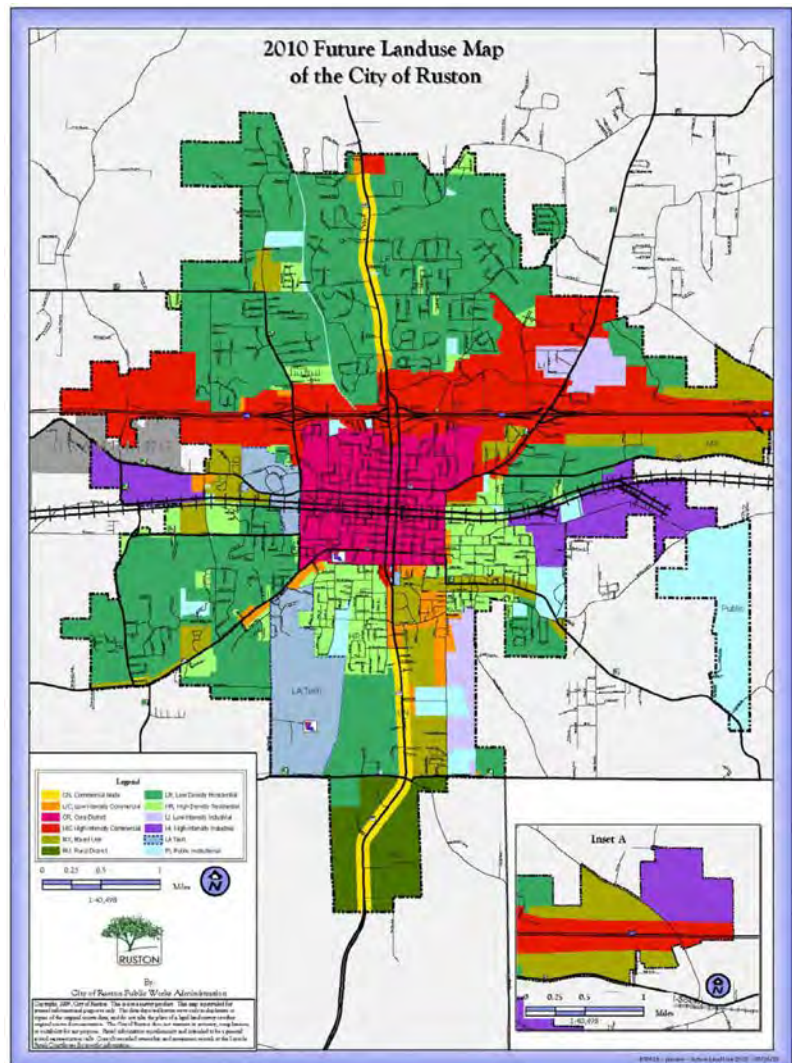
### D. Second step – you need at least a Future Land Use Map

The zoning commission drafts a zoning ordinance, zoning map, and it is recommended, at least a future land use map (example provided) of the different zoning districts for the community as a guide to future decisions. The future land use map may prove important in a potential judicial review of a zoning decision in proving the decision was not arbitrary and capricious, as discussed in the section of this discussion below on **State Your Reasons**.

### Comprehensive Plan or Comprehensive Zoning Plan?

A question often arises in the drafting process as to what else must be considered for adoption along with the draft zoning ordinance? State statutes do not provide much help. La. R.S. 33:4723 states that zoning regulations “shall be made in accordance with a comprehensive plan.” (See La. R.S. 33:106.B., master plan, for a definition.) La. R.S. 33:4724 refers to a potential “comprehensive zoning plan” as being adopted by a municipality prior to adoption of zoning regulations.

However, no such plan – comprehensive plan, master plan, or comprehensive zoning plan - is referred to in the Louisiana Constitution (Art. VI, Sec. 17) as a prerequisite to the grant to local governmental subdivisions of the authority to adopt zoning





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ordinances. And Louisiana courts have been lenient in determining that any local government's "comprehensive plan" or "comprehensive zoning plan" can be deemed satisfactory through administration of the zoning ordinance and its accompanying maps over time. See Palermo Land Co. v. Planning Commission of Calcasieu Parish, *supra*, at p. 497.

#### **E. Final step - Adoption and later Amendment through Rezoning**

After it completes its drafting work, the zoning commission holds a public hearing before recommending the zoning ordinance (along with at least the future land use map) to the board of aldermen or city council. **La. R.S. 33:4726.A.** The board of aldermen or city council then adopts the zoning ordinance following its own public hearing. **La. R.S. 33:4726.A., referring to La. R.S. 33:4724.B.**

#### **F. What rights do Local Governments in Louisiana have to Regulate Private Property through Zoning?**

##### **1. Balancing of Constitutional Rights**

- **Private Property Rights**

The right of private property specifically is guaranteed under La. Const. Art. I, Sec. 4.

- **Governmental Regulatory Rights under Police Power and Zoning Authority**

But the same Article of the Louisiana Constitution guaranteeing the right of private property also specifically subject it to the "reasonable exercise of the police power."

The police power is defined as "the state's inherent power to govern persons and things, within constitutional limits, for the promotion of general health, safety, welfare and morals." City of New Orleans v. Board of Directors of the Louisiana State Museum, 98-1170 (La. 3/2/99), 739 So.2d 748.

Art. VI, Sec. 17 of the Louisiana Constitution grants explicit authority to local governmental subdivisions to enact zoning and other land use regulations, which the Constitution declares to be "a public purpose."

##### **2. Statute**

The constitutional authorization to local governments for zoning and other land use regulations is made subject to their adoption under "uniform procedures established by law." These uniform procedures for municipalities are found at **La. R.S. 33:4721**, et seq., and for parishes at **La. R.S. 33:1246 (38)(a) and 33:4780.40 et seq.** Note that these statutes are of general applicability, with municipalities and parishes operating under home rule charters

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having different procedural standards, as long as they do not impinge on the state's police power. American Waste and Pollution Control Co. v. St. Martin Parish Police Jury, 92-1433 (La. 11/30/92), 609 So.2d 201.

It is a general rule that "everyone holds his [or her] property subject at all times to every valid exercise of the police power." State ex rel Prats v. City Planning and Zoning Commission of New Orleans, 59 So.2d 832 (La. App. Orleans 1952).

"The authority to enact zoning regulations flows from the police power of the various governmental bodies." Palermo Land Co. v. Planning Commission of Calcasieu Parish, 561 So.2d 482 (La. 1990), one of the few truly landmark cases in Louisiana zoning law.

The authorized power of governmental bodies to enact zoning regulations under their police power "is valid if it bears a rational relation to the health, safety and welfare of the public." Four States Realty, Inc. v. City of Baton Rouge, 309 So.2d 659, 672 (La. 1974) (decision on rehearing). Similarly, "to sustain an action under the police power, the court must be able to see that its operation tends to some degree to prevent an offense or evil or otherwise to preserve public health, safety, welfare or morals." City of New Orleans v. Board of Directors of the Louisiana State Museum, *supra*.

### **3. Limitation of Governmental Zoning Regulation - Least Restrictive Use and Not Arbitrary and Capricious**

Courts in Louisiana hold that a zoning ordinance, since it is a limitation or intrusion on private property rights, must be construed to allow the least restrictive use of the private property. See City of New Orleans v. JEB Properties, Inc., 609 So.2d 986 (La. App. 4<sup>th</sup> Cir. 1992), citing City of New Orleans v. Elms, 566 So.2d 626 (La. 1990).

"The Federal Due Process Clause as well as our own State Constitution prohibit a governmental entity from applying zoning classifications which effect a taking where the governmental decision is clearly arbitrary and capricious. U.S.C.A. Const. Amend. 14; La. Const. Art. 1, Sec. 2." Church v. St. Charles Parish, 00-185 (La. App. 5 Cir. 8/29/00), 767 So.2d 913, in which the appellate court reversed a trial court award of \$325,000 in damages originally awarded for the denial of a lounge's certificate of occupancy whose nonconforming use status was at issue.

### **G. Rezoning**

Sometimes, in order to achieve the highest and best use of property, it is appropriate for an owner or developer to ask the local governing body to amend its zoning ordinance to place a new zoning classification on the affected property. Such rezoning begins with an application to the locality's zoning commission (La. R.S. 33:4725), which, after a properly noticed public hearing, will report its findings and recommendations on the rezoning request to the legislative



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body of the municipality (La. R.S. 33:4726). The municipal governing authority then will accept or reject the recommendations of the zoning commission.

If the elected governing authority believes the property should be rezoned, it will enact an ordinance amending the general zoning ordinance to reflect the change. If it believes the rezoning request is inappropriate, it rejects the commission's recommendations.

As such, ordinances adopting zoning regulations and rezoning amendments are legislative acts carried out by municipal governing authorities – boards of aldermen and city councils – as a natural exercise of the political subdivisions' police power, (Village of Euclid v. Ambler Realty Co., supra), constitutional, and statutory authority.

#### **H. Judicial Review**

Zoning decisions, like all legislative acts, always are subject to review by the courts in a properly filed lawsuit. Local governing authorities therefore must recognize from the start that their decision in a land use case ultimately may be reviewed by a court.

Once the issue enters the judicial system, the issue no longer is one of politics and the only question is whether, based on the standards discussed previously, the zoning decision can be upheld as a matter of law as not being arbitrary and capricious.

In legal theory, since zoning decisions are legislative in nature, a *prima facie* presumption of validity attaches to the decision made by the governing authority. (Palermo Land Co. v. Planning Commission of Calcasieu Parish, supra).

But as seen in this discussion, courts can take a decidedly different view from that of local governing authorities in zoning cases. This especially is true if the courts believe the decision made was unfair as purely political, if fundamental due process rights were violated, or even if there were no stated reasons for the decision in the minutes of the meeting at which the decision was made.

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**SUBDIVISION BASICS**

**A. What Are Subdivision Regulations?**

Subdivision regulations are land use controls that govern the division of land into two or more lots, parcels or sites for building.

“**Subdivision**” can mean the making of two lots out of one lot, or it can mean the making of 150 lots out of one lot.

The official definition for subdivision, contained in Louisiana Revised Statutes 33:101, is:

the division of a lot, tract, or parcel of land into two or more lots, plats, sites or other divisions of land for the purpose, whether immediate or future, of sale or of building development, and, with regard to parishes, for the purpose of sale or of building development for purposes other than agricultural. It includes resubdivision and, when appropriate to the context, relates to the process of subdividing or to the land or territory subdivided.

When you split a lot into two or more lots, you must follow the local laws applicable to subdivisions, if any.

“**Resubdivision**” can mean subdivision, such as when a group of 20 previously subdivided lots is subdivided again into 25 lots. It can also mean the consolidation of previously subdivided lots, such as when a group of 20 previously subdivided lots is subdivided again into 15 lots.

The official definition for resubdivision, also contained in La. R.S. 33:101, is:

in addition to being synonymous with “subdivision”, means and shall also include the consolidation of two or more lots, plats, tracts, parcels, or other divisions of land into one or more lots, plats, tracts, parcels, or other divisions of land.

**B. What Elements Comprise Subdivision Regulations?**

Subdivision regulations usually include a procedure to obtain plat approval from the applicable local authorities, design criteria for the subdivision, and construction standards for public infrastructure and improvements.

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#### **C. What Are the Purposes of Subdivision Regulations?**

This depends on your point of view.

If you are a purchaser of a lot, subdivision regulations ensure that the property will have public improvements, or infrastructure, when the developer is ready to begin construction; create official records of lots in the public records of the parish where the property is located which establishes title.

If you are a developer, subdivision regulations provide guidance for engineering and construction details and also a standard for competitors in conjunction with the master planning of the surrounding area.

If you are a local government engineer, subdivision regulations ensure that new streets, utilities and drainage systems are designed and built according to local standards.

If you are a public health official, subdivision regulations ensure that the development has proper sewage disposal, water drainage, and a safe water supply.

If you are a town planner, subdivision regulations offer a way to coordinate the unrelated plans of many developers.

If you are an environmental activist, subdivision regulations can offer a way to protect sensitive resources, such as wetlands.

Juergensmeyer and Roberts, *Land Use Planning and Development Regulation Law*, Second Edition, Practitioner Treatise Series, Thomson West, 2007.

#### **D. What Is the Authority for Subdivision Regulations Under Louisiana Law?**

The general enabling legislation under Louisiana law for subdivision regulations is contained in Louisiana Revised Statutes, Title 33: Municipalities & Parishes, Chapter 1: Creation, Organization, Alteration, and Dissolution.

#### **E. When Do Subdivision Regulations Apply to Me?**

Non-Home Rule Charter local governments can enact subdivision regulations without creating a planning commission and delegating to it that authority pursuant to **La. R.S. 33:1236(38)**. However, most such local governments delegate that authority to a planning commission.

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The local government must create a planning commission pursuant to **La. R.S. 33:4726** for municipalities (or **La. R.S. 33:4780.45** for parishes).

Then, when the planning commission has adopted a major street plan for its jurisdiction and filed certified copy of such plan with the local legislative body (e.g. police jury or city council) and the parish clerk of court, the planning commission can adopt subdivision regulations (see **La. R.S. 33:112**). **La. R.S. 33:111** states that is when the scope of control of a subdivision is vested in the parish or municipal planning commission. After control is vested in the planning commission, the local government has no authority over subdivision decisions made by the planning commission, unlike zoning decisions. This is called the “platting authority.” There may be special legislation with exceptions for certain local governments.<sup>1</sup>

Once this occurs, anyone who wishes to file or record any plat must first get the approval of the planning commission in writing on that plat signed by its chairman or secretary. **La. R.S. 33:111**.

#### **F. How Is A Subdivision Plat Approved?**

The process for filing a plat and getting approval from the planning commission begins in Chapter 15 of Louisiana Revised Statutes, Title 33.

**La. R.S. 33:5051** provides that “whenever the owner of any real estate desires to lay off the same into squares or lots with streets or alleys between the squares or lots and with the intention of selling or offering for sale any of the squares or lots, he shall, before selling any square or lot or any portion of same”:

1. Have the land surveyed and platted or subdivided by a licensed surveyor into lots and/or blocks designated by number;
2. Set monuments at all of the corners of the lots and blocks;
3. Write the lot designation (or number) on the plat; and
4. File the plat with the clerk of the parish where the property is located usually in a plat book, with a copy also filed in the conveyance records, and a copy filed in the tax assessor’s office.

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<sup>1</sup> Examples include Act 189 of 1954 which provided for the creation of the Bossier City-Parish Metropolitan Planning Commission by Bossier City and the Bossier Parish Police Jury and Act 558 of 1956 which provided for the creation of the Benton-Parish Metropolitan Planning Commission by the Town of Benton and the Bossier Parish Police Jury.

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This plat, sometimes called a map in the statutes, must include:

1. Section, township and range in which the land is located;
2. Dimensions of each square in feet, feet and inches, or meters;
3. Designation of each lot or subdivision of a square and its dimensions in feet, feet and inches, or meters;
4. name of each street and alley and its length and width in feet, feet and inches, or meters;
5. Name or number of each square or plat (sic) dedicated to public use;
6. Certificate of the parish surveyor or any other licensed land surveyor of this state approving the plat, or map, and stating that it is in accordance with the provisions of Section 5051 and with the laws and ordinances of the parish in which the property is situated (this is usually a standard certification block that the surveyor uses on all plats, his stamp and a signature); and
7. Formal dedication made by the owner or owners of the property or their duly authorized agent of all the streets, alleys, and public squares or plats (sic) shown on the map to public use.

The dedication is not effective as to the local governing body until:

1. the dedication is formally accepted by a written certification that the streets are in compliance with all construction standards per local ordinances; or
2. the governing body starts maintaining the streets.

**La. R.S. 33:5052** provides that the clerk and recorder in the appropriate parish cannot file an act of sale or deed to property in a subdivision unless the developer has complied with the provisions of 33:5051.

Under **La. R.S. 33:113**, “a planning commission shall approve or disapprove a plat within sixty days after submission thereof to it.” If the planning commission does not approve or disapprove it within 60 days, it is deemed approved, and the commission is obligated to issue a certificate of approval on the demand of the applicant, usually the developer or landowner.

The applicant may waive the 60-day requirement and consent to an extension of this time period. This usually happens when the planning commission requests additional information, or the plat is incomplete, or the applicant wants to correct or modify some aspect of the plat.

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This 60-day rule is limited, however, by another provision in **La. R.S. 33:113** which provides that any plat that is submitted to a planning commission cannot be approved or disapproved without conducting a public hearing on it (exception – minor plats, administratively). Louisiana caselaw has deemed the 60-day rule ineffective when there has been no public hearing on the plat. See Old Jefferson Civic Ass’n, Inc. v. Planning Comm’n for City of Baton Rouge & E. Baton Rouge Parish, 364 So. 2d 193 (La. App. 1<sup>st</sup> Cir. 10/9/78); see also Brownlee Dev. Corp. v. Taylor, 438 So.2d 618 (La. App. 2<sup>nd</sup> Cir. 9/12/83). This limitation has also been cited by the federal courts. See G&H Development, LLC v. Nancy Penwell, et al, No. 15-0272, 2015 WL 3408796 (W.D. La. May 27, 2015).

What does this mean? A developer cannot leave a plat on an administrator’s desk and start the 60-day clock running. It must be a complete plat and application, and the administrator must place it on the planning commission’s agenda for a public hearing.

After a public hearing on the plat (required by **La. R.S. 33:113**), the commission can vote to approve or disapprove the plat. If more information is needed, the commission can table it for the next meeting, but it must remember the 60-day rule. Here is where the applicant can waive such rule and consent to the extension of time. Usually, the additional information can be gathered and a revised plat produced, if necessary, before the next month’s planning commission meeting, which is safely within the 60-day period. This rule was designed to prohibit the disapproval (rather than to allow the approval) of a plat by a planning commission’s inactivity. Old Jefferson Civic Ass’n, Inc., 364 So.2d at 196.

#### **G. Does a Planning Commission Have Discretion in Approving/Disapproving Plats?**

Yes. Like zoning decisions, the decision to approve or disapprove a subdivision plat by a planning commission is a legislative act, as an exercise of its legislative discretion based upon the data presented to it, pursuant to **La. R.S. 33:101.1**.

The decision to approve or disapprove a subdivision plat is a discretionary process – i.e. the decision is in the discretion of the planning commission based on a review of the plat, local law, and the specific facts and circumstances. See City of Hammond v. Parish of Tangipahoa, et al., 985 So.2d 171 (La. App. 1st Cir. 3/26/08) where it states “the act of approving or disapproving a subdivision plat is statutorily recognized and defined as a legislative function involving the exercise of legislative discretion by [a] Planning Commission.”

However, there is a case by the Louisiana Second Circuit Court of Appeal (which covers the 20 northernmost parishes in Louisiana) called Urban Housing of America, Inc. v. City of Shreveport, 26 So.3d 226 (La. App. 2<sup>nd</sup> Cir. 10/28/09), writ denied, 2010-0026 (La. 4/23/10), 34 So3d 269, which overruled the trial court’s decision that said a governmental authority (the City Council, in that case) had “boundless discretion” in approving a subdivision plat. The Second Circuit held



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the City Council to a “checklist” for subdivision approvals. Since the developer met all the application and ordinance requirements, no discretion was allowed in the decision. This case seems to be an anomaly (although writ was denied, narrowly, by the Louisiana Supreme Court) but know that it exists.

#### **H. What Are Minor Subdivision Plats?**

A minor plat is a subdivision plat that can be approved administratively without a public hearing. **La. R.S. 33:113.1** gives a local authority the right to adopt an ordinance by which it or the planning commission can establish procedures for approving or certifying a plat if it involves only a minor modification of an existing parcel of land without a public hearing.

What constitutes a minor modification?

1. The realignment or shifting of a lot boundary, including removal, addition, alignment or shifting of interior lot boundary lines, or the redesignation of lot numbers provided the application for subdivision meets the following requirements:
  - a. the plat does not create any new street or other public improvement;
  - b. the plat does not involve more than 2 acres of land or 10 lots of record;
  - c. the plat does not reduce a lot size below the minimum area or frontage requirements established by local ordinance; and
  - d. the plat otherwise meets all the requirements of the subdivision regulations and zoning ordinances.
2. A redesignation of a lot number and establishment of new boundary lines as a result of the expropriation, dedication, sale or other transfer of a portion of a parcel of land to the parish or municipality which leaves a severed portion of the original parcel.

These plats are typically called minor subdivisions or minor plats. The same certification is indicated on the plat and it is recorded, like other approved plats.

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**THE DECISION BOX**

**1** **BE CLEAR**

**Have Clearly-Written Ordinances, Procedures, Staff Reports (...And Stick to Them!)**



The first step to take in order to protect your decisions against potential lawsuits is to **be clear** in your written words.

In other words, your clearly-written ordinances, procedures, staff reports should be understandable/comprehensible/intelligible/uncomplicated/explicit/simple/straightforward/unambiguous/clear-cut/crystal clear.

Let's be clear: you want your written ordinances, procedures, staff reports **to be easy to perceive, understand, and interpret**.

**Why Is Being Clear Important to the Decision-Making Process for Zoning and Subdivisions?**

If you do not have written ordinances, procedures, and staff reports that are clear (or, insert your choice of synonym above), you may be subject to a lawsuit alleging you were arbitrary and capricious.

Since such decisions you make affect the public, the public – not only public administrators and officials - must be able to understand the words you write and use. **The public must trust the decision-making process of the local government. Trust begins with understanding, and that starts with having clearly-written ordinances, procedures, and staff reports.**

**It's All About the Written Word: Be Clear and Careful**

Ambiguity (read: *not clear*) can lead to lawsuits due to open interpretation of an unclear zoning ordinance.

For example, a recent federal lawsuit against a metropolitan planning commission and Parish involved the plaintiff developer seeking approval for rezoning (from farmland to single family residential) and subdivision approval of a high-density development in the middle of established horse farms outside a small town in a parish in North Louisiana. The language at issue in the zoning ordinance, "urban building site", was used for a procedural basis which required rezoning approval. Defendants believed that section of the Code of Ordinances clearly applied to the proposed development in that it provides that the "subdivision or imminent

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subdivision of open land into urban building sites makes reclassification necessary and desirable.” That is, no subdivision without the land first being rezoned.

The problem was “urban building site” was not defined in the Code or original ordinance and invited a legal challenge, even though it had been consistently applied in the administration of the zoning ordinance.

In the federal court proceeding, in addition to proof of consistent application, a separate case decision was cited by the Parish which interpreted the same ordinance language at issue to prove to the Court that the developer had no “of right” entitlement to develop the subdivision without approval of rezoning. The Court was persuaded and refused to hold that the actions of the Parish or planning commission were arbitrary and capricious and without any conceivable rational basis.

To make sure you have clearly-written ordinances, if your municipality already has zoning and subdivision ordinances, it is important for you to understand the zoning regulations on which you rely to make decisions. If there are certain portions of such regulations you see as potentially open to interpretation, ordinances can be drafted to amend such ambiguous regulations to make them clearer.

If your municipality does not have zoning and/or subdivision regulations, take note that your zoning code does not have to be a \$1 million dollar project. If you have the basic zoning components included in your zoning ordinance, and state what you intend to achieve, then you are taking the first step in properly protecting your decision-making process.

When drafting, considering, or making a decision involving zoning or rezoning, remember your purpose is clear: Be Clear and Careful.

#### **Using Your Clearly-Written Procedures/Staff Reports and Sticking to Them**

What not to do? Not have staff reports. You need staff reports of some kind, even if a summary of what is being requested by the applicant.

Staff reports written by the community’s assigned liaison to the zoning commission (often the zoning administrator) and submitted to your town’s zoning commission, serve the purpose of providing a clear understanding of the application on which the zoning commission must make a decision.

What to do? The staff report should include information about the zoning and future land use for the property and whether there are any questions about the appropriateness of the application.

## **Who Are You Calling Arbitrary?**

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Basic Components of a CLEAR staff report to follow, along with model example (next) of a staff report in a rezoning application:

1. Your header should properly and clearly provide a “snapshot” overview of the application.
2. Provide a clear, complete description of location and current zoning.
3. Describe requested zoning, and state what zoning is permitted in the location.

*Helpful note: Use-by-right zoning allows ANY of the permitted uses, not just the proposed one.*

4. Describe the surrounding neighborhood.
5. Clearly point out the relevant differences in the current and proposed zoning districts.
6. State any additional issues that may result from rezoning.
7. Explain the effect of the Master Plan on the rezoning application or at least whether the application is consistent with the future land use map.
8. Provide any staff suggestions for other potential problems or solutions. It is not required to be in the form of a staff recommendation, but make the members aware of options for consideration.

# Who Are You Calling Arbitrary?

## A Guide to Help Protect Your Land Use Decisions Without Inviting Lawsuits



### Our Town Letterhead

Mayor

**To:** Our Town Zoning Commission  
**From:** Zoning Administrator  
**Date:** August 1, 2015  
**Subject:** Case No. 100 Application to rezone to R-2 Two-family Residential  
**Applicant:** Richard Beck  
**Location:** 1224 Cypress Avenue  
**Zoning:** R-1 Single-family Residential  
**Future Land Use:** High Density Residential  
**CONSISTENT WITH MASTER PLAN:** Yes

Include enough heading information to get a "snapshot" overview of the application

Provide a clear, complete description of location and current zoning

Describe what is permitted in the requested zoning. Use-by-right zoning allows ANY of the permitted uses, not just the proposed use.

Mr. Richard Beck owns the undeveloped lot at 1224 Cypress Avenue, Lot 11 of Bayou Subdivision. The entire subdivision is currently zoned R-1 Single-family residential. Mr. Beck is requesting rezoning to R-2 Two-family Residential zoning so he can build a duplex on the lot. R-2 zoning allows either single family or two-family homes.

Describe the surrounding neighborhood

Bayou Subdivision has 40 lots; 30 of these lots have single family homes, and 10 are undeveloped. Six of the undeveloped lots are contiguous and on the North side of Cypress Avenue. Mr. Beck's lot is at the West end of these 6 contiguous lots.

The average lot size is 6,500 square feet, and all lots meet the minimum lot requirements, for R-1 zoning districts:

Describe the relevant differences in the zoning districts

Minimum Requirements	R-1	R-2
Square Footage	6,000	8,000
Front setback	25	30
Side setbacks	15	20
Rear setbacks	15	20

Describe any additional issues that may result from rezoning

Mr. Beck's lot is 8,100 square feet but because of an irregular lot line along a drainage channel, he is limited to providing only a 15 foot setback on the East side of the lot. If this single lot is rezoned, a separate variance would be required if he wishes to place a home any closer than 20 feet from the side setbacks.

Explain the effect of the Master Plan on the application

The Future Land Use Classification of this subdivision in the Town's Master Plan is High Density Residential, which allows both R-1 Single-Family Residential and R-2 Two-family Residential zoning districts.

Staff suggests that additional options for your consideration may include waiting on applications for 1) resubdivision of the undeveloped contiguous lots to adjust the lot lines so that setbacks for the proposed zoning can be met and 2) consideration of rezoning of all of the contiguous undeveloped lots to the same zoning classification.

Provide any staff suggestions for other potential problems or solutions. Does not have to be in the form of a staff recommendation, just make them aware of other options for consideration

## **Who Are You Calling Arbitrary?**

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#### **What Are The Statutory Requirements for Advertising Zoning Ordinances?**

Before using your ordinances, procedures, and staff reports, you must follow the process of notifying the public of certain actions. For example, zoning amendments include the following statutory requirements for advertising such actions:

**STEP 1:** Zoning Commission holds a public hearing to consider rezoning/Zoning ordinance then makes written report of recommendations to the City Council/Town Council/Board of Aldermen.

**Publication Requirement – La. R.S. 33:4726:** Requires advertisement of the title of Ordinance in the official journal three times before the hearing. Ten full days must elapse between the first running of the ad and the hearing. **NOTE:** *Written notice of the hearing other than publication is not required by State Statute to anyone other than the owner of the property being zoned or rezoned.* **La. R.S. 33:4724.C.**

**STEP 2:** City Council/Town Council/Board of Aldermen introduce the Ordinance

**Publication Requirement – La. R.S. 33:4725,** referring to **La. R.S. 33:4724:** Requires advertisement of the title of the Ordinance again in the official journal three times before the Council/Aldermen conduct their hearing. Ten full days must elapse between the first running of the ad and the hearing.

**STEP 3:** City Council/Town Council/Board of Aldermen considers the report from the Zoning Commission, holds a public hearing, then votes on the rezoning Ordinance. The Ordinance must then be published in the official journal.

**Publication Requirement – La. R.S. 33:406.D(2) and La. R.S. 43:143:** The municipal clerk must publish the adopted ordinance within twenty days of its adoption.



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**THE DECISION BOX**

**2** LISTEN

**LISTEN:**  
**Give citizens their right to be heard, but follow your laws & procedures**

**If you do not provide a reasonable opportunity for the applicant and citizens to be heard, you invite mistrust and a lawsuit for due process violations.**

Under Louisiana statute, public hearings on zoning applications are required both by the municipal zoning commission and legislative body (board of aldermen or city council). **La. R.S. 33:4724** and **La. R.S. 33:4725**. The zoning commission makes a recommendation to the legislative body, and the ultimate decision is made by the

board of aldermen or city council, since rezoning involves an amendment to an ordinance (the municipality’s zoning ordinance).

For subdivision applications, a public hearing is required before the municipal planning commission. **La. R.S. 33:113**.

Procedural due process under the Fifth or Fourteenth Amendments to the U. S. Constitution requires notice of a hearing and reasonable opportunity to be heard prior to governmental action which “deprive individuals of ‘liberty’ or ‘property’ interests”. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976). With public notice of required public hearings through advertisement having been discussed in the prior section, we will consider public comment.

**Public Meetings Law**

Zoning and subdivision cases, given their required public hearings, inherently and properly will involve listening to the applicant and citizens both for and against an application. Public comment also is guaranteed by the Louisiana Public Meetings Law (**La. R.S. 42:11 et seq.**)

Specifically, **La. R.S. 42:14.D**. requires a public comment period by every public body such as a planning or zoning commission, board of aldermen, or city council, prior to action on an agenda item upon which a vote is to be taken.

However, it is important to note that this right of public comment is subject to the adoption of “reasonable rules and restrictions regarding such comment period.” **La. R.S. 42:14.D**.

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#### **Adopt Rules for Public Hearings**

Given the ability to adopt “reasonable rules and restrictions” for public comment, it is recommended that each planning and zoning commission and local legislative body adopt such rules and regulations and apply them uniformly for their land use cases. These can include reasonable time limits (such as three to five minutes per speaker, or a longer period to primary spokespersons in favor and in opposition) and an announced order of presentation of speakers, typically hearing from the applicant and those in favor of an application first, then hearing from opponents. And lastly, allowing a short rebuttal from the applicant. Also recommended is a requirement that all questions should be addressed to the board or elected body and not members of the audience.

When such rules and regulations are adopted, they should be routinely announced at the opening of each meeting by means of a standard “script” to be read by the chair of the meeting. Such a script can help avoid losing control of the hearing that follows, as well as show a good faith effort to provide a right to be heard by all interested persons.

#### **Public Opinion is An Element of the Decision, but Not The Overriding One**

While public concerns have been declared to be a proper element in the consideration of decision makers in land use cases (see, e.g. Palermo Land Co. v. Planning Commission of Calcasieu Parish, *supra*), public bodies must follow their rules and not be swayed solely by public opinion.

Overreliance on public input to the point of ignoring the municipality’s own ordinances and procedures can and has led to the mocking reversal by an appellate court cited at the first of this discussion. WRW Properties, LLC v. City of [ ], *supra*. See also, Urban Housing of America, Inc., v. City of Shreveport, 44,874 (La. App.2<sup>nd</sup> Cir. 10/28/09), 26 So.3d 226, writ denied, 2010-0026 (La. 4/23/10), 34 S.3d 269.

So by all means listen to public input. But follow your ordinances, rules, and regulations.

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**THE DECISION BOX**

**3**

**BE CONSISTENT – TREAT SIMILARLY SITUATED INDIVIDUALS EQUALLY**

**BE CONSISTENT:  
Treat similarly situated  
applicants equally**

If you do not treat similarly situated individuals equally, you may be subject to a lawsuit alleging you violated an individual's rights to equal protection under the federal and/or state constitutions.

Remember that zoning and subdivision decisions are legislative acts under **La. R.S. 33:101.1**; discretion is allowed in the decision-making process. Under the law, that means that a zoning or subdivision decision can only be overturned or subject to a constitutional challenge (like a violation of equal protection) if the decisionmaker was arbitrary or capricious.

Put another way – A constitutional claim will be successful against you if there was no rational basis for your decision.

Put another way – A constitutional claim will be successful against you if your decision bore no rational relation to the governmental objective, i.e. the health, safety or general welfare of the public.

This is a very high standard for the challenger to meet. Courts generally will not overturn a land use decision by a governmental authority if there is any rational, conceivable basis for the decision. But first the courts must be convinced the decision was reached in a fair manner.

To avoid litigation in land use decisions, you must treat similarly situated applicants equally. So, what are some examples of treating similarly situated applicants equally?

**Zoning**

Zoning regulations must be uniformly applied within each zoning district or zone, pursuant to **La. R.S. 33:4722** for municipal zoning regulations or **La. R.S. 33:4780.41** for parish zoning regulations.

Variances, special use approvals, or conditional use approvals are permitted, but the application of these must also be applied so as to not treat similarly situated applicants differently.

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For example, a local government may not issue special use permits to some applicants and then fail to issue one to a similarly situated applicant. So, you should consider the consequence(s) of the first “special” approval. Think about what it means for the next request that is presented for approval.

Examples of “similarly situated applicants” – builders of apartment complexes; landowners requesting special use approval for mobile homes on their property.

Think of them as “groups.”

You cannot make a decision affecting one of those landowners and not make the same decision for another in the same “group” if there is no rational basis for it. That is a denial of the latter’s rights to equal protection under the law.

A note on “spot zoning” – The American Planning Association defines “spot zoning” as:

The zoning of a small land area for a use which differs measurably from the zoned land use surrounding this area. Land may not merely be so zoned in the interest of an individual or small group, but must be in the general public interest. Such zoning does not conform to the future land use plan and is not otherwise necessary in order to protect the health, safety, welfare, or morals of the community.

Spot zoning is okay if a rational basis exists (i.e. you can show that the decision was rationally related to the health, safety or general welfare of the public).

#### **Subdivision**

A subdivision plat application may not be granted in certain situations but then refused in similar situations without some rational basis for the refusal.

For example, a local governmental authority may not first approve three phases in a planned subdivision development but later refuse to approve a fourth phase without some significant difference in the plan or some other rational basis. See Urban Housing of America, Inc. v. City of Shreveport, 26 So.3d 226 (La. App. 2<sup>nd</sup> Cir. 10/28/09), writ denied, 2010-0026 (La. 4/23/10), 34 So.3d 269.

Another example is the failure by a planning commission to enforce a specific requirement in a plat application for one applicant but requiring it in another. An example is the “last man standing” situation – i.e., you may be subject to an equal protection challenge if you require, as a condition to approval, the last subdivision developer in a specific area to make significant infrastructure improvements if the previous developers in the area were not required to do the same.

## **Who Are You Calling Arbitrary?**

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#### **What is a Rational Basis for Treating a Similarly Situated Applicant Differently?**

In the case of Reid v. Rolling Fork Public Utility District, 854 F.2d 751 (5<sup>th</sup> Cir. 1988), a federal court found that it was rational for the district to refuse sewer service to a development because that district's current infrastructure was at capacity, even though it had previously approved sewer service to similar developments.

#### **What Are Some Practical Ways To Help You Treat Similarly Situated Applicants Equally?**

1. Track zoning cases, and update the zoning map.
2. Track subdivision cases, and update on the zoning map.
3. Keep accurate minutes of meetings and public hearings.
4. Adopt a master plan and/or future land use map, and refer to it in decisions.

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**THE DECISION BOX**

**4**

**STATE YOUR REASONS FOR DECISION ON THE RECORD**

**GIVE YOUR REASONS:  
(not your opinions)  
State your reasons for  
decision on the record**

**Why Is it necessary to state your reasons for decision?**

A court in doubt as to the reason for a land use decision is a court more likely to reverse the decision.

As previously emphasized, a zoning decision or subdivision consideration, like any decision of a municipal governing authority, is a legislative function involving the exercise of legislative discretion. But specifically under Louisiana statutes,

both zoning and subdivision decisions are declared subject to review in court on the grounds of “abuse of discretion, unreasonable exercise of police powers . . . or denial of the right of due process.” (Emphasis added.) **La. R.S. 33:4721** (zoning), and **La. R.S. 33:101.1** (subdivisions).

This standard of judicial review makes sense under the previous recommendations of this discussion, particularly when recalling that municipal zoning authority arises from an exercise of the local government’s inherent police powers to regulate the health, safety, morals, or general welfare of the locality.

**No Basis in Health, Safety or General Welfare = Arbitrary and Capricious Decision**

The Louisiana Supreme Court has declared the test for overturning a zoning decision to be whether the decision is “arbitrary and capricious” as bearing no “substantial relationship” to police power concerns and, therefore, an unreasonable exercise of municipal police powers. Palermo Land Co. v. Planning Commission of Calcasieu Parish, supra, confirmed by King v. Caddo Parish Commission, 97-1873 (La. 10/20/98), 719 So.2d 410 at 419.

The statutory reference to “denial of the right of due process” also anticipates the similar legal test should a local government be unfortunate enough to be sued in federal court over a land use decision on federal constitutional grounds as a denial of substantive due process. Such a decision will be declared unconstitutional in that instance only if, stated the same way as in State court, it “is clearly arbitrary and capricious, having no substantial relation to the public health, safety, morals or general welfare.” FM Properties Operating Co. v. City of Austin, 93 F.3d 167 (5<sup>th</sup> Cir. 1996).



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This cited federal court decision also is noteworthy for declaring that within the jurisdiction of the U.S. Fifth Circuit, which includes Louisiana, federal court review of local zoning decisions is the exception instead of the norm. (Plaintiffs will attempt to sue in federal court in an effort to get around the Louisiana statutory prohibition of a jury trial in a state court lawsuit against a political subdivision, **La. R.S. 13.5105**.) The appellate court in FM Properties said that the “review of municipal zoning is within the domain of the states, the business of their own legislatures, agencies, and judiciaries, and should seldom be the concern of federal courts.”

Beware, however, that “seldom” the concern of federal courts does not mean “never”. Defense of a lawsuit in federal court is a potential budget-busting experience in which rapid pretrial dismissal of the lawsuit is an essential legal strategy. Dismissal of the lawsuit is aided immeasurably by a complete record providing reasons for the decision.

#### **Courts Look to Fairness of the Decision**

Judicial review of a zoning decision in Louisiana state court is, legally, a “new” (de novo) proceeding in which the issue to be decided by the court is whether the result of the legislation is arbitrary and capricious, and therefore the taking of property without due process. The plaintiff challenging the zoning decision has the burden of proof. Palermo Land Co. v. Planning Commission of Calcasieu Parish, *supra*. This means that new testimony can be presented at trial on behalf of the local governmental body in an effort to uphold the zoning decision.

However, courts can and do impose their own general standard of fairness in the exercise of judicial review of land use decisions. This connects with the specific “abuse of discretion” standard of review in the state statutes cited above.

Experience has demonstrated that a key factor to courts in whether to uphold or reverse a subdivision or zoning decision is whether the action of the local governing body is supported by reasons for the decision stated in the record. This means that the members of planning and zoning commissions, and local legislative bodies, should carefully consider and state their reasons for decision in the minutes of the meetings that will be reviewed by the court in the event of an appeal.

Without such a record, courts find an easier excuse for reversal. Remember that such reversal is justified under case law and statute if a land use decision is found to be arbitrary and capricious as having no substantial relationship to health, safety, or general welfare concerns. Therefore, if the record of decision is silent as to that connected relationship, a judge’s natural tendency is to wonder about the required legal foundation of the decision.

In state court, upholding the decision means the judge deciding that “appropriate and well-founded concerns for the public could have been the motivation for the zoning ordinance.” (Emphasis added.) Palermo Land Co., *supra*, at 491. Or in federal court (see FM Properties),

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whether there is a “conceivable” rational basis for the land use decision under police power considerations – conceivable to the federal judge, that is.

As one state court appellate judge put it during oral argument, “If the City Council refuses to give its reasons for deciding this kind of case, there is not much the court can do to assist it.” The result in that case was reversal of the city council, and reversal of the trial court’s previous upholding of the city council’s decision.

#### **Stated Reasons under Police Power + Following Zoning Ordinance = Proof of Fairness of the Decision**

The recommended solution is to help the judge. If land use lawsuits turn on the judge being convinced that the decision of the local government was based on appropriate and well-founded police power grounds, then **state the reasons for the decision on the same basis: That facts concerning the health, safety, and general welfare of the public, plus application of the zoning ordinance to these facts, are the grounds for the decision and state these reasons in the record.** This important step makes the judge’s conclusion to uphold the decision that much easier.

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#### **Connect the Reasons for Decision to Health, Safety and General Welfare Issues**

- Unresolved traffic or drainage concerns, for example, represent clear public safety considerations under police powers. (But don't fail to address a professional traffic or drainage study submitted by a zoning or subdivision applicant that appears to answer the concerns.)
- Consistency (or inconsistency) with a community's comprehensive plan or future land use map provides a strong basis for a decision.
- Compatibility (or incompatibility) with the character of the neighborhood is anticipated as an appropriate factor in a zoning decision. **La. R.S. 33:4723**.
- On the other hand, objections to aesthetics or the way a proposed project being rezoned will look, likely will be insufficient as a basis for denying rezoning, at least absent the adoption of architectural standards in the zoning ordinance. Trustees Under Will of Annie Pomeroy v. Town of Westlake, 357 So.2d 1299 (La. App. 3<sup>rd</sup> Cir. 1978).
- Likewise, if public concerns are expressed over a loss of property values resulting from the proposed rezoning, they need to be backed up by something more than mere suspicions, such as by an opinion letter from a real estate professional.

#### **No Personal Opinions – Stick to the Facts**

But do exercise self-control to avoid any comments of your personal opinions for the same reasons as outlined in the section of this discussion on **Listening**. If you do not, you may face an avalanche of claims of constitutional violations over the decision, in addition to proving it is arbitrary and capricious.

By all means, avoid the kind of sidebar comments made by one city council member during a public hearing on a new underground bar proposed in a downtown area.

She turned to a fellow council member and asked in a voice that could be heard by the audience: *"Is this the gay bar we're supposed to turn down?"*

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**CONCLUSION**

Approach land use decisions by thinking and acting “within the box” and you will not be inviting lawsuits:

- **Be Clear**
- **Listen**
- **Be Consistent**
- **State your Reasons for Decision**



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