Who Are You Calling Arbitrary?

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

By:

Neil Erwin, J.D.
Susannah O. Stinson, J.D.
Caroline E. Mladenka, M.P.A.

Neil Erwin Law, LLC

&

Panelists:

Patricia Doane, Planner, Neil Erwin Law, LLC,
former Ruston Planning Administrator
Nancy G. Cooper, J.D., Shreveport MPC Member
Juanita Fowler, Director of Natchitoches Planning & Zoning

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Neil Erwin, J.D. is Manager of Neil Erwin Law, LLC, and has practiced for over 35 years. His career focuses on practical, creative solutions in the field of local government law, including litigation. During his career, he has had the privilege to represent both governmental bodies and businesses (including Wal-Mart, Kroger, Safeway, and Rite-Aid), gaining a unique perspective and understanding of the problems and opportunities of different sides. He is past President of the Louisiana City Attorneys Association, and is a frequent speaker on zoning, land use, and environmental law topics throughout Louisiana. He is a graduate of SMU and LSU Law School, where he was editor of the Louisiana Municipal Law Journal. He represents a number of local governments, is a past Assistant City Attorney for the City of Shreveport, and a past member of the Metropolitan Shreveport Zoning Board of Appeals.

Susannah O. Stinson, J.D. is Associate Attorney with Neil Erwin Law, LLC. Her law practice is in litigation, real estate, finance, municipal law, and land use, including traditional neighborhood development, plus condominium and subdivision development and restriction issues. Her experience includes practice with the Jones, Walker law firm in Baton Rouge, and later as Associate Vice Chancellor for University Development at Louisiana State University in Shreveport. She is a graduate of Louisiana Tech University, summa cum laude, and the LSU Paul M. Hebert Law Center, where she was a member of Order of the Coif and a Senior Editor of the Louisiana Law Review. She is a recipient of the "Top 40 under 40" award for young professionals by the Shreveport-Bossier Chambers of Commerce.

Caroline E. Mladenka, M.P.A. is Policy Analyst with Neil Erwin Law, LLC. She holds a Master's degree in Public Administration from LSU E. J. Ourso College of Business, following a BA in Communication Studies from LSU. Her education and experience (including dealing with the BP Oil Spill) provide a unique understanding of and ability to navigate the many variables, including citizen input, that affect the course of decision making in the field of local government law. Her drafting and implementation expertise includes both zoning ordinances and subdivision development restrictive covenants. She is a recipient of the "Top 40 under 40" award for young professionals by the Shreveport-Bossier Chambers of Commerce. She provides a presence in Baton Rouge, where she lives with her husband (owner of Cou-Yon's Barbeque and Seafood, Port Allen), while maintaining a regular schedule in the law firm's Shreveport/Bossier City office.

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Patricia Doane joined Neil Erwin Law as Planner and Paralegal after an accomplished career of 36 years with the City of Ruston. For eight years she served as Ruston Planning Administrator, and before that, as City Cartographer/Demographer (including reapportionment and census verification). Her skills include: research, comparative analyses, and the ability to integrate land descriptions, surveys, and engineering plans into a complete land use planning and zoning code product usable by both citizens and professionals. During her career with Ruston, Pat led the conversion from hand drawn mapping to computer aided drafting, then to geographic information systems. Pat graduated from Northwest Technical College in 1975 with a degree in Civil Drafting and Surveying. Her training in the detail of survey work has added useful background for her career in land use and regulation, including the creation and analysis of real estate boundaries.

Nancy G. Cooper, J.D., is a member of the City of Shreveport Metropolitan Planning Commission and was born and raised in Shreveport, LA. She obtained her Bachelor of Arts in Economics from Baylor University and her Juris Doctor from Loyola Law School in New Orleans. She is admitted to practice in LA (1994) and Texas (1999) and has practiced law in Baton Rouge, Alexandria, and San Antonio before moving back to Shreveport in 2010. Mrs. Cooper now works for the Louisiana State Mental Health Advocacy Service and Child Advocacy Program representing children who have been removed from their homes due to abuse/neglect and children who are admitted to psychiatric facilities throughout the State. She has been on the Shreveport-Caddo MPC Board for 3 years and currently serves on the executive board as secretary. In addition, Cooper is a member of the Caddo Youth Planning Board--Step Forward/My Brother's Keeper sub-committee and St. Mark’s Cathedral School Board; president-elect of the Shreveport/Bossier Chi Omega Alumni Association; and chairperson of the Captain Shreve High School Academic Foundation.

Juanita Fowler is the Director of Planning & Zoning for the City of Natchitoches. She has worked in that capacity for 16 years and prior to that she held the same position at the Parish of Natchitoches for 8 years. Fowler is responsible for the coordination of long-range planning initiatives, land use and zoning development, building construction, permits and code enforcement. She is a State Certified Floodplain Manager and serves as a Regional Representative to the Louisiana Floodplain Management Association Board. She is the administrative liaison to the Planning Commission and the Historic District Commission, which regulates development in the Natchitoches' Landmark District, one of only three nationally recognized landmark districts in the State. Fowler is an active member of APA's North LA Section and has hosted APA workshops and conferences in Natchitoches. She holds a Bachelor of Science Degree in Business Administration.

Who Are You Calling Arbitrary?

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

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. . . [your municipality]. . .

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

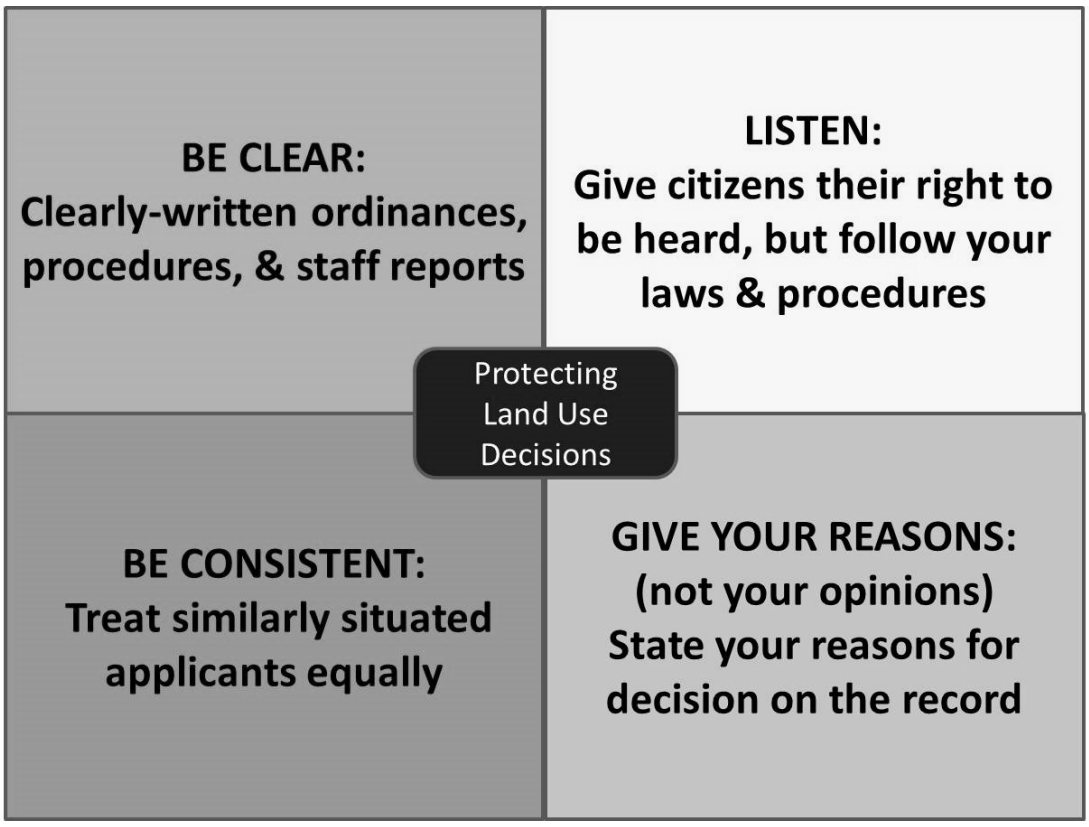
We realize that our opinions can be pretty dry, but it would help if the . . . City Council would at least consider our rulings that involve the council, particularly when the alternative is to continually repeat the same mistakes in an endless political loop." (Emphasis added.)

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

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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A. 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.

B. *Palermo* is Definitive Case for Louisiana Zoning Law

"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.

C. 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.

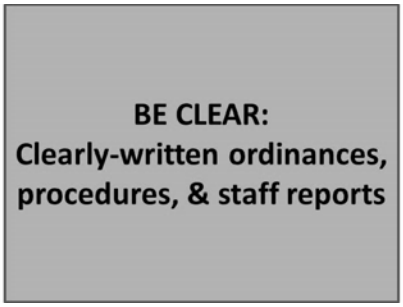
In legal theory, since zoning decisions are legislative in nature, a *prima facie* presumption of validity attaches to the decision made by the governing authority. (Palermo Land Co. v. Planning Commission of Calcasieu Parish, *supra*).

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.

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 Land Use Decisions?

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.

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.

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

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.

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.

Our Town Letterhead

Mayor

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

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

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

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.

Recent Cases:

G&H Development, LLC v. Nancy Penwell, et al., 13-0272, 2015 WL 3408796 (W.D. La. 5/27/15).

A developer sought approval for a subdivision of property zoned Residence-Agriculture for an approximately 150-lot subdivision arguing that the subdivision was a "use by right" under the R-A ordinance. The local MPC's administrator rejected the application because the zoning of the property was R-A instead of R-1. Developer sued the MPC and Parish (as well as other individual defendants) for violation of its substantive due process rights. Defendants believed that the

amendment section of the zoning ordinances applied to the development because it stated that the "subdivision or imminent subdivision of open land into urban building sites makes reclassification necessary and desirable." The problem was "urban building site" was not defined in the Code or original ordinance, even though it had been consistently applied since inception.

In addition to proof of consistent application, a separate case from another state was cited by Defendants which interpreted the exact same language at issue to prove to the Court that the developer had no "of right" entitlement to develop the subdivision without rezoning. The Court agreed and held that the rejection of the application by the administrator was not arbitrary and capricious.

City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So.3d 320 (La. 2014).

La. Supreme Court, reversing the Baton Rouge district court on direct appeal, upheld the restrictive local definition of "family" for purposes of local zoning ordinance restricting permissible occupancy of homes in a single-family residential zone.

Definition: "Family is an individual or two (2) or more persons who are related by blood, marriage or legal adoption living together and occupying a single housekeeping unit with single culinary facilities; or not more than two (2) persons, or not more than four (4) persons (provided the owner lives on the premises) living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost sharing basis."

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.**

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.2nd 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.

Recent Case:

Vieux Carre Property Owners, et al v. City of New Orleans, 14-0825, 2015 WL 1736870 (La. App. 4th Cir. 4/15/15).

Challenge by Vieux Carre Property Owners, French Quarter Citizens, Inc., and an individual challenging approval of Board of Zoning Adjustments for application by Antoine's Restaurant for recognition of its right to perform live entertainment denied, resulting in win for Antoine's. Key evidence: recognition of Dept. of Safety and Permits, upheld by Board of Zoning Adjustments, over the complaints of neighboring property owners, of 14 affidavits submitted by Antoine's from staff members and owners attesting to each person's knowledge that the restaurant offered live entertainment as part of its operation of a continuous, uninterrupted basis, since 1955.

THE DECISION BOX

3 BE CONSISTENT – TREAT SIMILARLY SITUATED INDIVIDUALS EQUALLY

BE CONSISTENT:
Treat similarly situated applicants equally

If you do <u>not</u> 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 <u>any</u> 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.

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. 2nd 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.

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 (5th 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.

Recent Cases:

KGT Holdings, LLC v. Parish of Jefferson, 169 So.3d 628 (La. App. 5th Cir. 3/25/15).

A developer sued the Parish over a denial of a resubdivision application by the Parish council. Evidence was introduced that similar applications had previously been approved. The Court stated "when applications are granted in similar situations and refused in others, the refusal to grant an application may constitute nonuniform application of zoning ordinances that is arbitrary and capricious."

Flanders v. Dzugan, et al, 2016 WL 110014 (W.D. Penn. 1/11/16).

A property owner sued a building code official and the municipality for their refusal to approve an addition to a development after property owner could not obtain a building permit, arguing he was treated differently than other similarly situated applicants whose permits were issued. Property owner did not submit required blueprint for modification to the property, unlike other applicants. Therefore, property owner's equal protection claim could not stand.

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 (5th Cir. 1996).

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 sub-division 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 capri-cious 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),

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.

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. 3rd 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?*"

Recent Cases:

Petroplex International v. St. James Parish, 15-140, 2016 WL 301883, ____ F.3d ____ (E.D. La. 1/25/16).

Rejection of a petroleum tank farm, for which plaintiff started acquiring property but not a permissible use under a subsequently adopted parish-wide Master Land Use Plan, was not a violation of federal substantive due process since record showed local government based its decision on a conceivable rational basis for the zoning decision.

The case recognizes that "federal review of land use decisions is 'quite different from the review to which they may be subjected in state court." And "violations of state law do not necessarily give rise to a cognizable federal constitutional claim."

Herman v. City of New Orleans, 158 So.3d 911 (La. App. 4th Cir. 1/21/15).

Approval by the New Orleans Central Business District Historic District Landmarks Commission for a 16 story, multi-use, residential building, upheld on appeal by neighboring property owners on appeal to the New Orleans City Council, also upheld by court of appeal.

Despite expert testimony that the City was arbitrary and capricious because the project filed seven or 10 design principles adopted by the Historic District Landmarks Commission, Court found the City held a public hearing, heard the recommendation from the City Planning Commission, received testimony and documentation from proponents and opponents, and weighed both sides of the issue before deciding in favor of the project.

The court of appeal declared "the record contains the minutes of the City Council meeting whereby councilmembers conducted a thorough analysis of the project before approving its

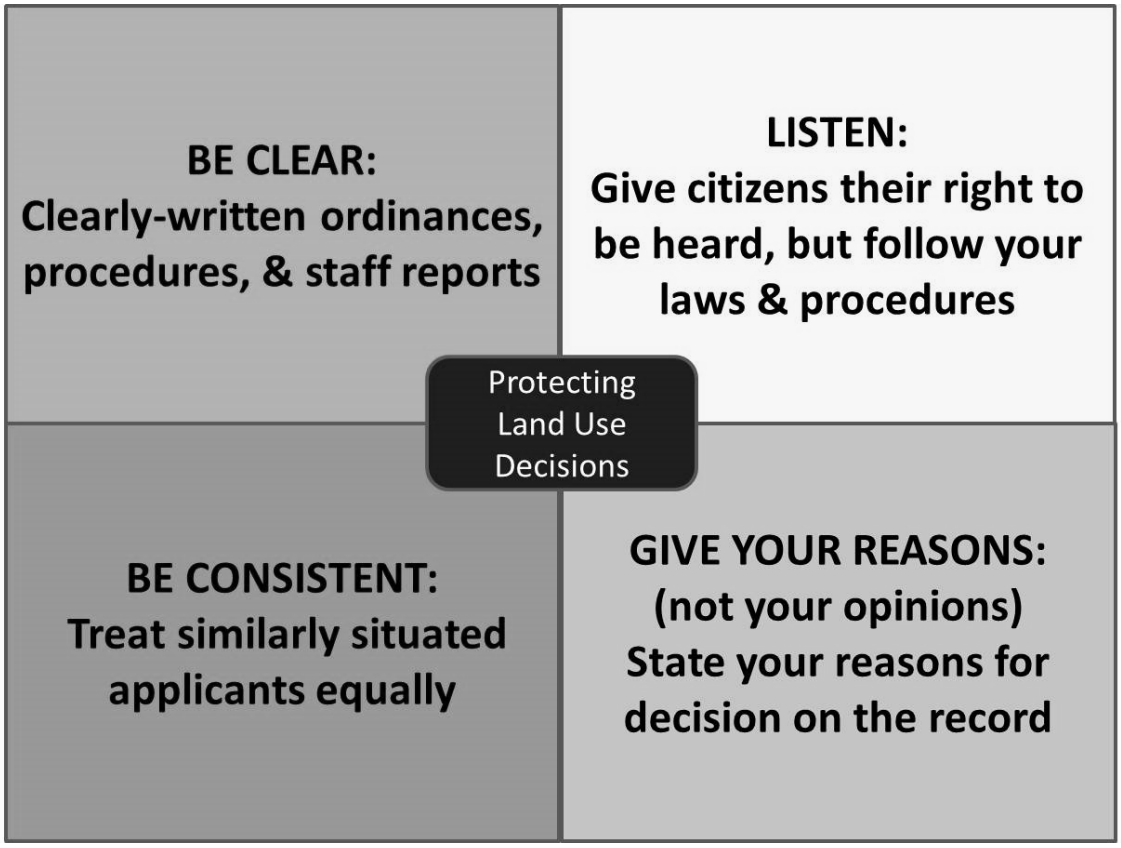
design. Further, the City Council member making the motion provided clear reasons justifying approval. Additionally, the Exec. Director of the Historic District Landmarks Commission provided a written report to the City council detailing the project history and explaining the analysis of the project of the design guidelines, and testified that the project did not have to meet all 10 of the design review guidelines and that some guidelines carry more weight than others.

Accordingly, the court found the argument that the Commission and City Council acted arbitrarily and capriciously to have "no merit."

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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