
Coates' Canons Blog: Choosing the Right Development Review Process: Factors to Consider

By David Owens

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The city will soon be making a major land use regulatory decision. There is a 15-acre site in town that is mostly vacant, but has a few modest, outdated commercial buildings. The site fronts a major street, so more intensive use is feasible. The owner has expressed interest in a new mixed use development that will include commercial and office space along with a substantial multi-family housing component. Much of the surrounding land behind the site has already been developed for single-family residential use and the neighbors will no doubt be strongly concerned about the traffic, noise, congestion, stormwater runoff, and other impacts of any intensive development. A variety of detailed land use issues are likely to arise — questions about site design, street and sidewalk improvements, fiscal impacts for the town, building design, buffers and landscaping to mention a few.

What type of development review process should be used for this type of proposal? Would it be best to require a rezoning? Or perhaps a special use permit review? How about an administrative review by staff experts to apply detailed development standards?

The short answer is that it depends. A zoning ordinance can be structured to use any of these three types of review. The challenge is to think about what type of review is best suited for different situations and needs and then to structure the ordinance so that anticipated developments are placed into the appropriate category.

Choices Available

A city or county has three basic options when it comes to choosing which type of regulatory review process to use. It can choose to use a legislative, quasi-judicial, or administrative review process. This choice is not made on an ad hoc basis as individual development applications are received. The ordinance itself is structured to require one of these three types of review in differing situations. As applications are received they must be processed based on the policy choices that are reflected in the ordinance.

Each of these options serves a distinct purpose and each requires a very different review process. In brief:

Legislative decisions set policy and provides the decision-making board with the maximum amount of discretion. The process that must be followed also allows maximum public engagement. There is a required public hearing with broad public notice and a mandatory planning board review.

Quasi-judicial decisions require the board to apply standards that are already set in the ordinance using a legalistic process to gather quality evidence to resolve contested facts, and to apply those facts to standards that involve judgment (such as being “compatible “ or “harmonious” with the surrounding neighborhood). Public engagement is limited to those who have relevant evidence on whether the proposal meets the standards.

Administrative decisions require staff to apply objective standards set in the ordinance to facts that are supplied in applications. If the application meets the standards it is approved; if not, it is denied. The process is bureaucratic in nature, with minimal discretion or public engagement.

In previous posts we have explored the legal requirements for these processes. A board member cannot gather evidence outside the hearing in a quasi-judicial matter but can in a legislative matter ([here](#)). A board member with a bias cannot participate in a quasi-judicial decision but can in a legislative decision ([here](#)). Persons appearing as witnesses in a quasi-judicial matter offer sworn testimony, while citizens speaking at a legislative hearing are free to offer unsubstantiated opinions ([here](#) and [here](#)). It is permissible to have reasonable time limits for speakers at a legislative hearing, but witnesses must be given adequate time to present relevant, non-repetitive testimony in an evidentiary hearing on a quasi-judicial decision ([here](#)). Detailed, site-specific conditions can be added to quasi-judicial decisions, but usually not to legislative ones (

[here](#), [here](#), [here](#), and [here](#)). There is the possibility of combining use of these tools, such as with conditional use district zoning, but the basic rules for each process still apply.

Given the vastly different procedures that the law imposes on these different types of review, a vitally important consideration in crafting a development regulation is making sure the right process is used in the right circumstance. In the example provided at the outset, the ordinance could be structured to require any of these three options. The site could be placed in a low density single-family zoning district so as to require a rezoning in order to allow a mixed use development. The site could be placed in a district that allows mixed use development but only if a special use permit is obtained. Or it could be placed in a district that allows mixed use development automatically if prescribed objective standards are met.

Factors in choice of option

In crafting the ordinance, how should boards decide which process is best in a particular set of circumstances or setting? Traditionally, the principal factors guiding the decision have been the type of land use involved, the intensity or scale of the development, and the locations involved. But there are dimensions to this question that are often overlooked.

Here are seven questions that should be considered in making the choice of which development review process is appropriate.

1. Are there unresolved policy questions to be addressed? If decisions about what land uses and density levels would be appropriate, what design standards are needed, how to provide necessary infrastructure, or how to deal with environmental impacts have not yet been made, a legislative decision is the process to use. Where clear policy choices have been made and standards set, administrative decisions are appropriate. A closely related question is how much involvement by elected officials is desired? Elected officials make legislative decisions, but have little if any involvement in administrative ones.
2. Is speed, predictability, and certainty a key factor? An administrative decision is the quickest and most predictable for land owners and neighbors, while a quasi-judicial decision takes longer and requires more rigorous analysis. The legislative decision is by its very nature the least predictable and often slowest process. If a city wants to encourage development or redevelopment of a particular type at a specific site and already knows the standards that should be met, an administrative review rather than a rezoning would be the choice to make.
3. How much citizen engagement is desired? Legislative decisions allow for the most citizen engagement, quasi-judicial decisions allow those directly affected to present evidence, while administrative decisions are largely determined by staff without consulting the public. Politically sensitive policy issues are best broadly discussed in a legislative context, not resolved by staff members applying technical review standards. A rezoning allows broad public discussion, while most citizens will not learn of an administrative decision until after it has been made.
4. How much does the decision turn on detailed technical analysis and how likely is it that the facts will be contested? An administrative review is well suited to gather substantial information and conduct technical analysis. The quasi-judicial process is well suited to resolve contested facts, especially where both sides to a land use dispute are well represented. It is useful in this context to consider both the type of issues to be resolved and the type of decision maker needed. Professional staff make administrative decisions, quasi-judicial decisions are usually made by appointed boards, while legislative decisions are entrusted to elected officials. Legislative bodies sometimes struggle when limited to an adjudicative quasi-judicial process.
5. How much flexibility and discretion is desired? Legislative decisions allow the greatest discretion, administrative decisions the least.
6. Is there a need to tailor site-specific conditions? The legislative decision can be used for this in North Carolina (though not in some states). But the legislative process is better suited for setting broader community policies. The quasi-judicial process is useful when it is known that some conditions or exactions may well be needed, but a detailed individualized review is needed to determine their precise design or scale.
7. Is ease of administration and enforcement a concern? Administration of standardized, uniformly applied rules is far simpler than developing and keeping track over time of rules that change from parcel to parcel.

The choice to be made involves some inherent trade offs. A legislative decision allows a greater range of discretion and broad public engagement, but is not particularly quick or predictable. A quasi-judicial decision allows for a careful, searching inquiry into the facts, but is formal and legalistic, limiting possibilities for informal discussion among applicants, citizens and decision-makers. An administrative decision is quick and efficient, but requires more advance work on the ordinance (such as specifying necessary infrastructure improvements, design standards for a form-based regulation, or technical standards to be met) to be sure all of the right standards are in place before an application is made and it

provides little opportunity for governing board or citizen involvement. Efficiency and engagement are not mutually exclusive considerations, but sometimes one or the other will take precedence.

The time to determine which process should be used for a particular site or type of development proposal is before an application is submitted. This must be resolved in crafting or updating the development ordinance. It is too late in the midst of a hearing on a special use permit to decide more informal discussions between council members, the applicant, and staff would help refine the application.

With the example provided at the outset, the city should carefully consider its options and structure the development regulations accordingly prior to an application being made. If the city wants to have a broad public discussion about the types and intensity of uses that would be appropriate for the site, a legislative rezoning option would allow that to take place. If planning and policy discussions have already resolved those questions, but detailed review of the site plan, project design, and infrastructure improvements, as well as ample opportunity for neighbor comment and review is desired, a quasi-judicial special use permit would be appropriate. And if the city knows what is desired and permissible and wants to encourage development of the site in accordance with those standards, an administrative review with staff approval would be appropriate.

Which option is the right choice depends entirely on the context and what the city hopes to accomplish with the development approval process.

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