

# Making Use of Overlay Zones

by Elizabeth A. Garvin, Esq.

## WHAT IS AN OVERLAY ZONE?

Many communities are finding, with increasing frequency, that traditional zoning through residential, commercial, and industrial districts is not sophisticated enough to address complicated growth and development issues. To fill this void, local governments are creating zoning approaches with increased flexibility, aimed at more specialized targets and intended to solve problems identified in their community. One of these tools is the overlay zone.

The overlay zone is, as the name tells us, a special zone placed over an existing zoning district, over part of a district, or over a combination of districts. Put another way, the overlay zone includes a set of regulations that is applied to property within the overlay zone *in addition to* the requirements of the underlying or base zoning district.

The overlay typically provides requirements (or incentives) intended either to protect a specific resource or to encourage development in certain areas. Overlay zones allow for increased flexibility in local zoning since they more closely tailor needed requirements (or incentives) to areas within the community which share certain characteristics.

## USES OF OVERLAY ZONES

Perhaps the most common use of overlays zones is in dealing with development in environmentally sensitive

areas, such as floodplains, wetlands, hillsides, and aquifers. Properties within a floodplain overlay zone, for example, would be subject to requirements designed to minimize flood damage (e.g., minimum building elevations; use of certain building materials). These would be *in addition to* the requirements of the underlying zoning district in which the

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property is located (e.g., the underlying residential, commercial, or industrial zoning district would likely include standards for density, lot size, and setbacks). Thus a home located within both a single-family residential district and a floodplain overlay zone would need to meet the requirements of both.

Another very common type of overlay zone is designed for historic preservation. This overlay would apply to designated historic properties or to specific areas (or streets) within the community.

The historic overlay zone regulations might address issues such as building materials, colors, facade requirements, and other items identified by the community as important to maintain the historic nature of the structure or area. This approach is sometimes referred to as a “mandatory requirement” overlay, indicating that the restrictions identified in the overlay are mandatory prerequisites to development or redevelopment. Each property within a historic preservation overlay zone – as with any overlay zone –

would also be subject to the requirements of the underlying zoning district in which it is located.

A more recent, but increasingly popular, type of overlay zone deals with development along specified transit or highway corridors. Provisions in a transit corridor overlay, for example, might seek to encourage clustered development with increased density along a bus or light-rail corridor. The community would maintain the existing zoning, probably some variation of commercial, and then overlay the transit corridor designation. This corridor might provide density bonuses for clustered development; have a supplemental use list; target incentives such as tax increment financing or public/private partnerships to development within the corridor; and perhaps allow waivers from impact fee payments. This approach is sometimes referred to as an “optional requirement” overlay zone, where the incentives are optional to the developer.

An overlay zone could also contain a combination of mandatory and optional requirements, in a grouping determined by the local government to meet community goals and policies.

An overlay zone is typically created to address only one topic or a related group of topics (e.g., hillside, steep slope, and erosion control). The overlay zone should, however, be an enhancement to the existing zoning, not a complete alternative. If a community finds that it is attempting to address multiple topics within a single overlay or that there are multiple overlay districts within a certain area of the community, it may be time to explore changes to the underlying zoning classifications.

Overlay districts are close in nature to planned unit developments, and indeed may include some of the incentive techniques used in PUDs such as clustering

The “overlay technique ... appears to have derived its name from being drawn on tracing, mylar, or other translucent paper which was then placed or ‘laid over’ the official zoning map. ...”

— Michael E. Libonati & John Martinez, Sands & Libonati Local Government Law, Sec. 16.07 (1982).

and density bonuses, but overlay districts can be recognized by their subject – the thing that was the reason for the creation of the overlay district (e.g., hillside protection, airport over flight).

#### AUTHORITY FOR ESTABLISHING OVERLAY ZONES

While most state zoning enabling laws do not mention overlay zones, hundreds of municipalities across the country include overlay zones in their zoning ordinances. There is also little case law involving overlay zones. This is not surprising, given that overlay zoning has much in common with conditional use (special permit) zoning provisions, which specify additional requirements which certain uses must satisfy to obtain a zoning permit. Indeed, a New York court, in upholding a village's establishment of a preservation overlay zone noted that "this case is not unlike the power of municipal bodies to deny a special permit to a legislatively authorized use which is subject to the additional requirement of a special permit." *Zartman v. Reisem*, 399 NYS 2d 509 (1977). In researching this article, I found only one major court case, in Arizona, striking down an overlay zone *Jachimek v. City of Phoenix*, 819 P.2d 487 (Ariz. 1991).

As always, however, it makes sense to have your city or town attorney advise you on your own state's legal requirements and ensure that whatever overlay zones you are developing would withstand any legal challenge.

As with any zoning regulation, an overlay zone must be adopted according to state and local notice requirements and subject to required public hearings.

#### BASIC CONTENTS OF AN OVERLAY ZONE

Some of the basic items that are key to a useful overlay zone include:

*Purpose Statement (Intent).* This provision identifies the subject of the overlay, the objectives of the zone, and if available, some of the background information that led to creation of the zone. It should also include reference to any

local plan(s) being implemented by the overlay zone.

*Applicability.* This should include identification of where the overlay zone will apply, the underlying zones that will be affected, and the types of development subject to the overlay zone.

*Definitions.* Any specific or unique terms used within the overlay should be defined either in the overlay zone text or in the definition section of the zoning ordinance.

*Permit/Procedural/Approval Requirements.* If there will be additional permitting, certificate, or procedural requirements, they should be identified or cross-referenced, along with submission requirements. If there will be an intermediate review body, such as a design review board or environmental commission, their role should also be identified.

*Use Lists.* Changes to the underlying zoning district(s) use list(s) (as of right, accessory, conditional or special use permit) must be identified.

*Overlay Criteria.* The substantive requirements of the overlay zone. This might include bulk regulations, site layout, design review, mapping, signage, architecture, parking, requirements for incentives and/or bonuses, and all other information necessary to meet the community's goals for the overlay.

#### SUMMING UP:

Overlay zones are a useful and increasingly common tool employed by communities attempting to direct planning and land use controls at specific problems or issues. They should be carefully drafted to ensure that they reach planning and policy goals and are not simply another layer of general zoning regulation. ♦

*Elizabeth A. Garvin, Esq., AICP, is an attorney and planner with HNTB in Kansas City, Missouri. She has worked with numerous communities on revisions to their land development ordinances. Garvin holds both a law degree and a master's in urban planning from the University of Kansas. She co-authored (with Martin Leitner) "An Introduction to Subdivision Regulation" in Issues 5 and 6 of the PCJ 1992).*



## Highway Overlay Zones

A growing number of communities are adopting overlay zones along major roadway corridors. These overlays set out additional requirements (e.g., setbacks; landscaping) for properties within the designated corridors. The statement of purposes for the Raleigh, North Carolina highway overlay district reflects the typical goals of this kind of overlay:

"The Special Highway Overlay District-1 is intended to protect and preserve the natural scenic beauty along designated major access corridors and specified principal arterials which are located now or will be constructed within this Overlay District. Maintaining the attractiveness of these roadway corridors will enhance the economic value of the community by encouraging tourism and trade. This Overlay District is established also for the purpose of:

- Protecting the public investment in and lengthening the time during which highways can continue to serve their functions without expansion or relocation by expediting the free flow of traffic and reducing the hazards arising from unnecessary points of ingress and egress and cluttered roadside development;
- Reducing the costs of future highway expansions by requiring that buildings and structures be sufficiently set back from the right-of-way to provide adequate storage for vehicles until they can safely enter the highway;
- Reserving adequate roadside space through which neighborhood traffic may be admitted to and from the highway system in a manner that avoids undue traffic concentrations, sudden turnings and stopping and other hazards; and
- Achieving a common unified appearance along a roadway with other jurisdictions of the county. ..."