LAND DEVELOPMENT REGULATIONS 101:

A PRIMER FOR AUTHORS AND EDITORS

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LAND DEVELOPMENT REGULATIONS 101: A PRIMER FOR AUTHORS AND EDITORS[1]

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> "Good legal writing is both an art and a science."
> Rick Baker, Mayor, City of St. Petersburg.

> "Unlike a press release, a political campaign speech, or directions on how to assemble metal shelving, the language chosen to express the intent of the Legislature must be free of ambiguity. In a sense, the drafter should think of himself or herself as in an adversarial position with those attorneys, somewhere in the future, who may try to twist his or her words and arrive at an interpretation quite different from that which was intended by the drafter and the sponsor. Extreme care should be taken to design a package of words which expresses the desired intent, or which will produce the desired result." *Guidelines for Bill Drafting*, Florida House of Representatives

Your city manager has asked you to write, or at least review, amendments to your city's land development regulations – or, to your greater consternation, review a substantial revision of the land development regulations written by an outside consultant or your own urban planners.

Do not despair. Others have plowed similar ground before you.

"Land development regulations" is a broad term covering not only the zoning code but the restrictions upon the development of land that may or may not include (in your jurisdiction) adult uses, alcoholic beverages, historic preservation, landscaping, parking, signs, subdivision regulations, and tree protection.

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[1]This is a somewhat refined edition of a paper presented to the Florida Municipal Attorneys Association's 26th Annual Seminar, July 19-21, 2007. I cite Florida authorities and give examples from St. Petersburg's experience throughout this paper but the principles of good legislative draftsmanship are universal.

For the lawyer beginning such a task, the good news is that you don't necessarily need to know much about the technical aspects of land development regulations. If you don't know an FAR from a TDR, or an LOS from an ISR,[2] you can get by if you have an urban planner who can explain such terms to you, and if you maintain an inquisitive "how does that work" and "what if" frame of mind throughout the process. You will gain a working knowledge of the basic concepts long before you are ready to sign your name to the final product.

A word of caution is in order. Young urban planners, like young lawyers, tend to think in abstract terms. Experience teaches us the need to speak and write in concrete terms. Because lawyers think of the law as an adversarial process, the mind of a lawyer who writes regulations will learn to focus upon how a particular provision might be "hammered" by opposing counsel in a hypothetical case. Meanwhile, the planner is thinking along the lines of how the regulations will benefit the community as a whole. This may explain why lawyers and planners sometimes wish they had translators so they may communicate more effectively with each other.

Things the lawyer should watch for

Rule One: In Florida and in many other states, the land development regulations must be consistent with your city's comprehensive plan.

Rule Two: See Rule One. I emphasize this because inconsistencies with the comprehensive plan are frequently alleged. The lawyer should remember that the comprehensive plan was mostly written by the planners. The plan is typically a massive piece of work with policies, goals and objectives, some of which conflict with each other on their face.

> For example, St. Petersburg's comprehensive plan has statements to the effect that the city has no need for additional residential acreage and no need for additional commercial acreage, and future expansion of commercial uses is restricted. But, the plan encourages mixed-use developments, which by definition are residential and commercial uses.
>
> The plan requires that inconsistencies such as this be resolved through interpretation. There is some authority in Florida that an inconsistency between a land use decision and the plan is fatal, and there can be no "balancing" to resolve such inconsistencies. This is an issue in a case now pending in which a future land use

[2]You may dislike acronyms but you will become accustomed to FAR (floor area ratio), TDR (transferrable development right), LOS (level of service), and ISR (impermeable surface ratio), and others.

designation for a mixed-use development is under attack for allowing more commercial acreage.

Of equal importance, in no particular order, the regulations must:

- Be consistent with countywide, regional and statewide plans (this issue varies from one county to the next, and from state to state).

- Be consistent with federal and state law. Watch for preemptions and prohibitions that limit home rule and land use regulatory powers.

  Examples (in Florida): Billboard regulations; community residential homes for the elderly, the physically disabled, the nondangerous mentally ill, and others; and alcoholic beverage establishments. §§ 70.20, 419.001, and 562.45, Florida Statutes.

- Avoid all the federal law restraints on government power that you learned in law school such as the Equal Protection Clause, the Due Process Clause, and the First Amendment.

- Include standards for decision-making. The absence of standards is often noted when a delegation of legislative authority is an issue, such as where an approval depends upon the consent of neighbors, or an official has been granted "unbridled" authority to approve a permit. The purpose of standards is to guide official decision making and allow for effective judicial review.

  This is easier said than done. Whether standards are sufficiently precise has generated much litigation with mixed results beyond the scope of this paper. For example, "compatibility with the neighborhood" or similar language is commonly used but is often attacked as being too vague. In Nostimo v. City of Clearwater, 594 779 (Fla. 2d DCA 1992), beer sales at a convenience store had been denied because of this code provision: "The use shall be compatible with the surrounding area and not impose an excessive burden or have a substantial negative impact on surrounding or adjacent uses or on community facilities or services." The ordinance was found to be constitutional on its face but unconstitutional as applied to the store's location.

  When a property owner such as a church or an adult entertainment use raises First Amendment issues, the standards for the decision makers are to be narrowly drawn, reasonable, objective and definite. Hollywood Community Synagogue v. City of Hollywood, 436 F.Supp.3d 1325 (S.D. Fla. 2006).

- Include clearly-defined procedures for every step along the way from the

initial application to the final decision, which may or may not include an appeal from a board to the elected body. Describe who will make what kind of decisions and who may hear appeals. Describe what decisions are subject to appeal and what are not.

> After hearing neighbors assert in two different cases that a staff report to one city board was subject to appeal to another board, St. Petersburg amended its regulations to say that staff reports are not subject to appeal. If someone wishes to dispute factual statements or code interpretations in a staff report, the proper time and place is the hearing before the board to which the report is addressed.

Things the urban planners (and everybody else) should watch for

All of the above, plus:

- Make it clear. If something can be misunderstood, it will be. Confusion is the plaintiff's lawyer's best friend.

- Brevity is the essence of clarity.

- Look for, and use, the kind of good English your high school English teacher tried to teach you.

- Look for internal consistency.

- Avoid duplicative material. Avoid repetitive material. Avoid redundant material. (You get the point.) Avoid defining the same term more than once unless the term has different meanings in different contexts.

- Look for language that prompts the " duh, say that again" reaction. The following is a real example. I could not make this up:

> In areas with reversed frontage lotting where the front yard of one lot adjoins the side yard or rear yard of another, the side yard involved shall be the width required in the district for that portion extending from the rear line of the front yard to the front line of the rear yard, and then shall run from the front line of the rear yard to the point of intersection of the rear line of the adjoining front yard with the lot line involved.

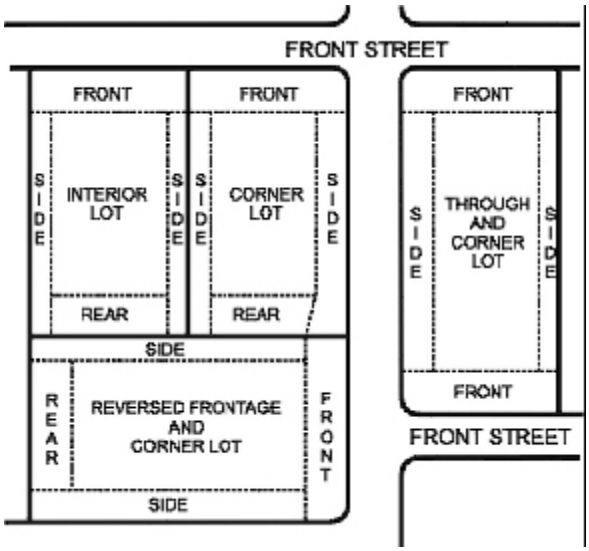
As you read that, the voice in the back of your head was probably asking:

> In areas [where?] with reversed frontage [is that term defined?] lotting [not lots?] where the front yard of one lot adjoins the side

> yard or rear yard of another, the side yard involved [how does a yard get "involved?"] shall be the width required in the district for that portion [of what – the side yard?] extending from the rear line of the front yard to the front line of the rear yard [on which lot?], and then shall run from the front line of the rear yard to the point of intersection of the rear line of the adjoining front yard with the lot line involved.

After a back-and-forth exchange between the zoning official and me, the final draft reads:

> Where the front yard of a corner lot ("first lot") adjoins the side yard of another lot ("second lot"), the side yard of the second lot shall be not less than the minimum width required by the district regulations between the front and rear yard lines. From the point of intersection of the side yard and rear yard lines [of the second lot], the side yard line shall run in a straight line to the point of intersection of the front yard of the first lot and the common boundary line, as illustrated in the diagram below.



A reversed frontage lot (the "first lot") is shown at the bottom of this drawing. The "second lot" is the corner lot above it. The trick was describing the line that runs at an angle to the common boundary line.

The final draft will win no awards for clear English. It is an improvement, but imperfect. The phrase in square brackets needs to be inserted if and when we amend this section again. In deciding to stop editing and move on to other issues,

I relied upon the diagram to clarify how to measure the side yard and our zoning official's representation that this will rarely be an issue.

- Avoid using a word that has two or more meanings in a context that may raise doubts as to what you intended.

  Example: "Permit" and "permitted"

  In zoning, a use may be a permitted use, a special exception use (sometimes called a conditional use), or a prohibited use.

  To build it, you need a permit. This sort of permit is a building code issue, not a zoning or land use issue.

  Something may be permitted in the sense of allowable. For example, a building may have additional height if the setback is deeper. To say that a building is permitted to have additional height does not necessarily mean that a special permit is required.

  A classic example of using the same word in two different senses is found in the sign code of Clearwater, FL, which says that certain signs are "permitted without a permit."

  St. Petersburg no longer issues fence permits. To say that a taller fence is "permitted" in some circumstances raises the question, do I need a permit for it? Answer: No. The taller fence is merely allowable.

  To say that "barbed wire shall not be permitted" is meaningless if the city does not issue fence permits. If the intention is to say that barbed wire is not allowable, "barbed wire is prohibited" says so in stronger terms.

- Be precise with numbers. Example: "less than ten" and "more than ten." What about ten, exactly?

- Avoid brand names and trademarks. Example: Change "dumpsters" to "solid waste containers" or "trash containers." Whichever phrase you use, use it consistently.

What the lawyer-editor can bring to the table

Give your urban planners (and others) tips for writing clear "legal English" that is enforceable. These tips include:

• Ruthlessly knock out redundant words and frequently-used phrases that, like barnacles, "slow your boat." These terms clutter up the writing, defeat the objective of writing clearly, and will not be missed when gone. Examples are:

pursuant to this section	Delete the phrase. Everything in a section is normally to be done pursuant to that section. Pursuant to a different section (specifying the section number) may make sense, but see my warning about too many cross-references.
official staff report	Delete "official." What other kind is there?
written report	Delete "written." "Written" is implied. If an oral report is called for, say so.

• If you can use one word instead of two or three, do so. If you can use a short word instead of a long one, do so. For example:

In the event ____	If ____
necessary to make the determination of ___	necessary to determine ___
which shall be in compliance with §____	which shall comply with § ____
shall not be required to comply with §____	need not comply with §_____
Maximum height shall be allowed to vary by up to six (6) inches if. . .	Maximum height may vary by up to six (6) inches if. . .
Chain-link fences shall be required to have a top rail.	A chain-link fence shall have a top rail.
any and all	any
each and every	each
prior to	before
signage	sign
utilize	use

These examples may seem picky but they illustrate that a cleaner writing style contributes to simplicity and clarity.

- Write in the singular. It focuses the brain and avoids sentences like this:

  "No habitable *structures* shall be added on *lands* occupied by nonconforming uses."

  Lawyer: But, judge! There is no violation here. The code prohibits adding two or more structures. My client added only one structure! The code doesn't prohibit the addition of one structure! Not only that, the property has only one nonconforming use!

  "Hedge regulations shall only apply to hedges within five (5) feet of *all property lines* of residential uses and within ten (10) feet of a property line for all other uses."

  Lawyer: But, judge! This hedge is within five feet of just one property line – not all of them!

- Do not mix singular and plural. Here's an example of what to avoid:

  "No nonconforming *structures* may be enlarged, altered or changed in a way which increases *its* nonconformity."

- Use "shall," "must," "will," "may," and "should" properly to get the desired effect. Use the right word to indicate mandatory requirements as opposed to "directory" or permissive statements. Your definitions section may say that "shall," "must," or "will" are mandatory, and "should" or "may" are discretionary or permissive. To keep it simple, I use "shall" for a mandatory requirement and "may" for a permissive statement.

  "Shall" has been criticized because nobody uses the word in ordinary speech, and because its meaning has become diluted through frequent misuses and inconsistent uses of the word. Examples of misuse are:

There shall be no right to a rehearing.	Change "shall be" to "is." This is not a statement of duty.
"Person" shall be defined as any natural person, corporation, . . .	Change "shall be defined as" to "means." There is no duty here.
Maximum height shall be allowed to vary by up to six (6) inches if. . .	Change "shall be allowed to" to "may." There is no duty to vary.

Another misuse of "shall" is illustrated by, "A chain link fence shall be required to have a top rail." "Shall be required" has a futuristic sound. A top rail might be required next month, but is it not required today? Change it to "shall have."

Because courts are always searching for legislative intent, they are free to decide that "shall" means "must," "should," "will," or "may."

Some legal writing experts advocate the use of "must," which is less legalistic and less corrupted. They point out that the change has already begun. The new Federal Rules of Appellate Procedure, for instance, use "must," not "shall."[3]

I am not entirely convinced. The Words and Phrases volume of Florida Jurisprudence summarizes two cases interpreting "must." "Must" was found to be directory, not mandatory, in one of them.

- Avoid "and/or." Pick one. Drop the other. If necessary, say, "A, B, C, or D, or any combination thereof," even though that violates the rule on brevity. Otherwise, a court might wonder, what did the city intend? You do not want a court asking that question. Make your intentions self-evident. If they are not, the court will use whichever word seems to fit the apparent intent of the legislature.

Justice Glenn Terrell of the Florida Supreme Court blistered the term "and/or" and the people who write it in no uncertain terms more than 70 years ago:

> In the manner of the use of the alternative, conjunctive phrase "and/or" it is sufficient to say that we do not hold this to be reversible error but we take our position with that distinguished company of lawyers who have condemned its use. It is one of those inexcusable barbarisms which was sired by indolence and damned by indifference and has no more place in legal terminology that the vernacular of Uncle Remus has in Holy Writ. I am unable to divine how such senseless jargon becomes current. The coiner of it certainly had no appreciation for terse and concise law English. Cochrane v. Florida East Coast Railway Co., 107 Fla. 431, 435, 145 So. 217, 218-219 (Fla. 1932).[4]

- Avoid "etc.," which means "and the rest." The rest of what?

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[3]Joseph Kimble, "A Modest Wish List for Legal Writing," 79 Mich. B. J.___ (online edition), (Nov. 2000). Mr. Kimble teaches legal writing at Thomas Cooley Law School.

[4]The term "and/or" appears 48 times in the Florida Statutes. Chapter 153, relating to water and sewer systems, uses the term 16 times.

- Avoid "and etc.," which demonstrates that somebody flunked Latin I.

- Avoid boilerplate. If you are amending an old code or borrowing from someone else's, you will find lengthy text that may have made sense when first written but should be tailored to your current code or scrapped.

> If a code requirement appears odd, question it. Do not assume that the planners intended to cause the silly or unlawful effect you foresee. More than once, we questioned a requirement and were told, "The consultant put that there. We don't know why. Go ahead and delete it." We did.

- Avoid the word "area" unless you mean the area of a floor or a piece of land. This is a frequently-used word that has no clear meaning. "Area of the law," for example, means what? Urban planners sometimes use "area" when they mean "neighborhood."

> "Neighborhood" is normally a fuzzy word but it can have specific meaning in some cities, such as St. Petersburg, where the City Council has accepted (not "approved" or "adopted") neighborhood plans developed by neighborhood associations. An accepted neighborhood plan will include, among other things, a description of the boundaries of the neighborhood.

- Avoid cross-references as much as is humanly possible. If you really need a cross-reference, try to avoid a cross-reference by code section number.

> The long-range problem with cross-references is that they are like crabgrass. Someday, you will amend some part of the text and will need to search the code to find and correct all of the cross-references. This is easier than it used to be, with computers, but a failure to correct all of the cross-references will come back to haunt you or your unfortunate successors later.

- Avoid the temptation to define every word. Rely on the common law rule that language taken from ordinary speech will be given its plain and commonly-understood meaning.[5]

> The problem with definitions is that they consume too much

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[5]Your state probably has case law supporting this statement: "When the statutory language consists of ordinary words susceptible to being given plain effect consistent with their ordinary meaning, expert testimony is not controlling or even appropriate." T.J.R. Holding Co. v. Alachua County, 617 So.2d 798 (Fla. 1st DCA 1993).

drafting time and frequently add nothing of value to the ordinance.

Another problem with definitions is, where should they be placed? In an early draft of St. Petersburg's regulations someone enthusiastically moved them all to a master definitions chapter at the end. This created conflicts because some terms are defined for a specific purpose at one location and a different purpose at another. We had to move some definitions back where they came from to avoid those conflicts.

• Do not over-work a definition. Keep substantive requirements (the "thou shalt not" part of the code) out of the definitions. Otherwise, the requirement may be overlooked and you will not have a clear code section to include in your citation or notice to appear when prosecuting a violation.

• Avoid typographical errors, especially those that result in stupid sentences such as:

> [The board should consider] whether more nonresidential land is needed in the proposed location to provide services or employment to the *resident* of the City. [Which resident?]

• Avoid the masculine pronoun used by itself. You can use "he or she," "his or her," and "him or her" if you wish, but the writing style becomes clumsy. You can add something like this to your definitions section: "Words in the masculine gender can include the feminine and neuter and vice versa," but this operates mainly to save old code sections. Using the masculine gender by itself has been a bone of contention since the 1970's if not earlier. (Neuter or neutral would cover corporations, partnerships, and other entities.)

"Their" is not a good substitute because you probably have only one mayor, one manager, one police chief, and so on down the line. It is debatable whether "their" or "they" may properly go with a technically singular pronoun, as in "Everybody . . . their . . .."

You can use a title instead of a pronoun. "City manager or his or her designee" can be even clumsier than "he or she," as in this example:

> If the City manager or his or her designee is notified of or discovers a failure to provide supplemental notice before noon on the day before the public hearing, the City manager or his or her designee may cancel the public hearing, reschedule the public hearing and require new notice to be given. The City manager or his or her designee should only take this action if. . .

To avoid that sort of clutter, define "city manager" to include "his or her designee," then use "city manager."

St. Petersburg uses a creative piece of shorthand to refer to the city manager (or, in our case, the mayor) or his or her designee. The city code defines "POD" to mean "the person officially designated in writing by the Mayor to perform the duties described in that portion of the St. Petersburg city code." "POD" now appears hundreds, perhaps thousands, of times in the code.

- Include "the," "a," and "an" (known to English majors as "articles") as appropriate. Some writers omit articles, apparently thinking this is the way to write official rules but demonstrating laziness instead.

- Never use a preposition to end a sentence with.[6]

Last but not least: Plan ahead for the transition from old to new. If you are also rezoning the whole city, consider adopting a moratorium on new applications. In the absence of a moratorium, adopt rezoning ordinances for specific parcels that identify the current and the proposed zoning districts or that have a delayed effective date. You should recognize applications "in the pipeline" by saying that a complete and otherwise acceptable application filed as of a specific date will be processed in accordance with the old regulations if there is a conflict.

What lawyers can learn from the urban planners

If your planners are going out of their way to solicit public comments on your land development regulations, this is a good thing. You will get a public "buy-in" that otherwise may not occur.

The City of St. Petersburg solicited public comments for several years, leading to adoption of a document called the "Vision 2020 Plan" and then to a revision of the land development regulations, adoption of new zoning districts, and rezoning of the city.

The new regulations have many pages of material that the Legal Department initially thought did not belong in the code because the material is not "lawyer-like," does not follow the style of legislation generally and, frankly, is not enforceable. For example, the new regulations for the Neighborhood Traditional Single-Family District open with this paragraph:

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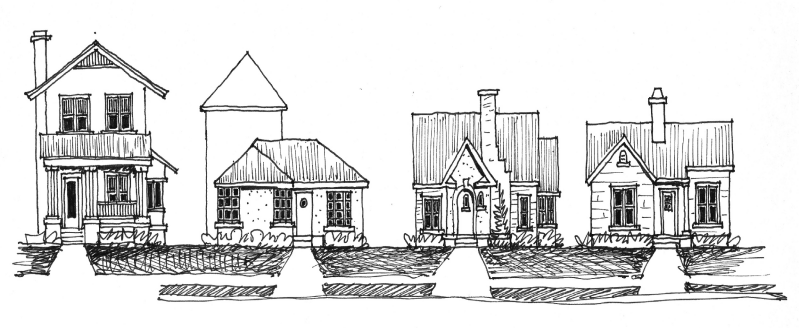
[6]Relax. I put this in to see if you are still reading along. Regardless of what your English teacher may have told you, ending a sentence with a preposition is sometimes called for. Prepositions can be used as adverbs or as "phrasal verbs" such as kicked off, coming in, or voted down. If a sentence with a preposition at the end seems clear, don't torture it trying to move the preposition inside. As Winston Churchill supposedly said, "That is the sort of nonsense up with which I will not put." You can look it up.

> Generally, the traditional neighborhoods of St. Petersburg were platted between the incorporation of the City and the mid 1920's, before multi-car households became common and when most people walked or rode public transportation. As such, these neighborhoods feature streets and buildings oriented to the needs of pedestrians rather than to the needs of cars.

The next several paragraphs discuss old subdivision plats (with their narrow lots), architecture ("early 20th Century"), lot layout (houses close to the street with minimal side and rear yards), and street layout (reliance on alleys for utilities and for access).

The regulations include this drawing of traditional houses in the district:



Typical Houses in a Neighborhood Traditional District

The regulations include the following statement:

> The design guidelines are intended to ensure compatibility with the existing character and pattern of these neighborhoods by requiring compatible building design and limiting the locations of driveways to certain areas of the property.

Despite our initial inclination to delete these paragraphs and drawings, we left them in because they explain the reasoning behind the regulations and give more meaning to the somewhat abstract concept of "compatibility with the existing character and pattern of these neighborhoods." A good explanation may be helpful for a reviewing court and should contribute to the "buy-in" when developers and architects read it later. This sort of language is analogous to the "whereas" clauses in the preamble of an ordinance, but has the advantage of being in the code book where people might actually read it.

Conclusion

Writing or editing land development regulations requires the same skills that transactional lawyers employ when writing contracts, but with other levels of complexity imposed by state and federal law include the need to enforce what is adopted. You can expect your urban planners to do a fine job of laying out the substantive requirements of your land development regulations but they will look to you to translate them into "terse and concise law English." Land development regulations are rarely terse or concise, but they must be clear, lawful, and enforceable.