

"Please Pull Up to the First Window"



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Far be it for a lawyer to bite the hand of the system that feeds him, but the issue of whether jurisdictions should regulate drive-through windows is worth discussing.

Drive-through windows have been around before the Golden Arches and as long as there are automobiles, there will be a demand for them. That demand sometimes emanates from the business operator, sometimes from the customer and most times from both. Local jurisdictions have a tendency to scrutinize and regulate the issue of drive throughs and this article looks at whether such scrutiny is justified and whether the effort is worth the jurisdiction's time and resources, not to mention the taxpayer's dollars.

The land use representation associated with drive-through windows, at times, seems disproportionate with the result, but our experience is that everyone is happy with the positive result. Why is this? The answer probably depends on the use. The primary users of drive throughs are fast food establishments, banks and pharmacies. But if you look hard and far enough, you'll find drive throughs for almost anything: beer stores along the North Carolina coast and even a peep show in Pennsylvania. Like most regulated uses, jurisdictional control coincided with the burgeoning popularity of a particular use. The first McDonald's drive-through was not regulated, but as more and more appeared, so did associated controls. It was only after an explosion of drive through uses that the controls came to be. Uses became victims of their own success.

Fast food restaurants realized that seventy five percent of its sales were generated out of the ten percent of the space that windows took up. The business model changed, and almost every fast food restaurant looking for a new site conditioned its lease or purchase on the ability to operate a drive-through window. Banks and pharmacies followed with a demand upon sellers or landlords for window capability. Bank customers did not want to leave their car to make a simple deposit. Pharmacy patrons did not want to come into the store to pick up a prescription. Unlike fast food, banks and pharmacies demand for drive throughs came from a different paradigm: fast food drive-through was driven by the realization that demand could be multiplied and investment could be leveraged though a little window. Banks and pharmacies responded to customer demand and the reality of competition: if your competition offered the convenience, you had no choice but to match it.

The basic issue of regulation is much more based on a question of traffic generation than it is of some perceived nuisance. The problem is that all drive-through uses have been painted with the same brush and they should not be. One size does not and should not fit all. A fast food restaurant generates multiples more traffic than a bank or pharmacy, but these latter uses are viewed and regulated from a perspective of fast

food. In one jurisdiction, the local Burger King was set as the exemplar of what should be required and regulated by the governing body before approving any drive-through us! Stacking (the number of cars in line, waiting for the window) requirements for all uses, including the less traffic intense bank and pharmacy, utilize outdated standards based on fast food requirements. Have you ever seen a line of cars at a pharmacy rival that of a fast food operation? For that matter, how often have you seen any line at a pharmacy window? Do you do some of your banking on-line? This would clearly result in a reduced need to visit a bank at all, let alone a teller window. Nonetheless, stacking requirements have not changed from the impervious pavement-friendly days of the 1970s, when everyone had to walk or drive to a bank.

If times have changed, why haven't the regulations? There probably are a few answers:

Governmental disdain for automobile related uses.

The automobile is not evil. It's a convenience for most, a necessity for some. We don't live in Manhattan, but some jurisdictions may sometimes think that way. In a zoning world where we were used to having to convince the nearby residents that an "automobile oriented use" was not an intrusion into their lives, we now find circumstances where the citizens feel that their government has been overly exclusive of such uses at the citizens expense and those citizens often speak at public hearings in favor of such uses.

Governmental desire to maintain control over the development process.

Some time ago, one of the major jurisdictions was considering changing bank and pharmacy drive through uses to uses 'by right' as part of a general overhaul of the zoning ordinance. The revised ordinance was advertised, hearings were held and there appeared to be no opposition to the revision. But, at the time the revised zoning ordinance was presented to the Board of Supervisors, the provision relating to drive throughs had been deleted. The word on the street was that, in the interim, one of the supervisors had been offended by what was felt to be a reneging on the part of a developer to do some conditional landscaping associated with a drive-through use. The supervisor was able to compel the work to be done because it was part of a development condition associated with a special exception and felt that if the special exception process was eliminated, that ability to control would be diminished.

Perception that automobile related uses will interfere with long range development plans or "visions".

The tension between improving the present and providing for the future exists in most land use cases. But that tension is more than one between time; it is often one between reality and possibility. Land use history is full of plans that come and go. The ones that stay can be good. The ones that don't can be an unnecessary temporary impediment to the general improvement of an area. Sometimes what local citizens view as welcome reinvestment in a declining area is not welcomed by planners because those improvements take the pressure off to change the area dramatically.

Opportunity for extractions.

If a use is a use 'by right', the developer is only constrained by normal setback and height requirements, building codes and the like. If a use requires a special exception, the jurisdiction can require transportation improvements, control signage beyond what is actually required by code, and control architecture and many other design elements. The jurisdiction can extract fees or "contributions" to various funds with a questionable nexus to the requested use.

A typical land use application for a drive through use takes the better part of a year before the public hearing process is concluded. Filing fees have increased significantly in various jurisdictions, but not to the point that the fees cover the real cost

to a jurisdiction for reviewing and processing an application. It is common for the prosecution of a drive-through use to require one hundred to two hundred attorney hours and an amount of civil engineering approaching that required for a full rezoning effort.

So what is the answer, or what is a proper balance? Loudoun County revised its zoning ordinance to allow up to two drive throughs for a bank without going through the entire process. This requires a user to think hard and long about whether those one or two extra lanes are really worth the effort. It also gives the user an opportunity to operate the business and, if he is right, go back to the jurisdiction in a year or two and request the expansion of the use because it has operated uneventfully and not negatively impacted the area. A variation on that theme would be to follow the tempered Loudoun alternative, but also impose additional development standards directed at the perceived impact of automobile related uses, thereby controlling the use by site plan rather than public hearing.

It seems that there are solutions to the expensive, time consuming process. But, it is a matter of whether the jurisdictions are willing to strike a balance of their own. They need to remove some of the use from the public arena and delegate some of the public (read that as political) oversight to the technical staff. It's a nice idea, but I suspect that I will continue to be busy doing what I have been doing.