Avoiding the Call –a Proactive Approach to Land Use and Zoning

By Michael Korns, Esq.

It is a tough market for developers, with both supply chain issues and inflation limiting your options. But luckily, you have found a great piece of property to develop. You have the perfect use in mind; you have your financing lined up; your engineers and architects have determined that you should have no issues with stormwater or permitting; utilities are available; and everything is good to go. You are deep into the due diligence period, perhaps even past it, when you get "the call" with news you never want to hear: "Just a heads up, there may be a problem with the zoning."

Of course, you looked at the zoning already. You checked the Use Table for this zoning, and you saw your use was listed. Or at least, something close enough was listed. And sure, the definition in the ordinance is a bit strange, and there are some nonsensical technical requirements that are confusing, but there must be a solution? But now the municipality is telling you that you are looking at months of hearings and approvals, and you are stuck in limbo and bleeding money with no guarantee this project will ever get off the ground.

Does this sound realistic to you? Unfortunately, as a land use and zoning attorney, it is all too realistic to me. Many times, when a developer calls, they are facing a situation similar to the one described above. Unfortunately, at this stage, there may be no way to save the project. Even if the issue can be resolved, the project can be significantly delayed, and in a business where timing is everything, a "perfect project" can turn into a black hole waiting for the legal process to unfold.

To prevent this, developers need to rethink their approach to land use and zoning. Rather than thinking of zoning as a middle timeline issue, instead, zoning must be one of the very first questions to be considered on any project. After all, zoning can tell you not just what you cannot do with a property, but more importantly what you can do, and developers should be looking at an ordinance with an eye on all options.

Rule 1 - Know Your Use

Only the most inexperienced developer would fail to check the Use Table for the property they want to develop. But a zoning use definition must be parsed very carefully before a commitment of funds. Although there are some commonalities among zoning ordinances, and ordinances can borrow from one another, across Pennsylvania, there are hundreds of zoning ordinances, each with its own quirks, rules, and definitions. Moreover, when each ordinance was adopted, it reflected the priorities of the governing body at that time. In some cases, that can mean certain definitions will be painfully exacting and detailed, likely reflecting some controversy at the time of drafting, while on the other hand, large swaths of the ordinance may have been copied from another municipality with barely a glance.

This situation occurs frequently with new and novel forms of business or entertainment. A zoning ordinance may have a provision for a recreation facility, but does that include a high-end bowling alley? A concert venue? A sports training facility? Does a co-working facility fall under an office definition? What about residential short-term rentals? Is it defined at all? Does it fall under a hotel use? It is critically important that you do not attempt to simply assume what the drafters must have "meant" by the ordinance and focus on what the definition actually says.

As municipal solicitors, we have reviewed many plans and discovered that the applicant had only a vague sense of how the property would be used in practice. While they knew what they wanted to build, they didn't know how it would be used, which is the critical question when seeking a zoning use approval. We have reviewed applications where the applicant had no answer to questions such as what types of activities would be on the property, whether there would be tournaments or spectators, whether there would be memberships or classes, the number of people to be on the site at any one time, hours of operations, types of equipment, whether food would be permitted, whether alcohol would be permitted, or whether indoor or outdoor activities would occur. Many of these applicants had spent significant funds on property acquisition and site design yet could not provide the municipality with the bare minimum of information necessary to determine whether zoning approval was even possible at this location.

To avoid this, it is usually best to do everything possible to make your project fit the ordinance, rather than the other way around. Look at how the ordinance defines your use, and follow that to the best of your ability, rather than stretch a definition. An early meeting with the municipality to see how they view the use is extremely valuable. If this is early enough in the project, it may be possible to change the project parameters to meet the municipality's expectations, while later, you may have already applied for other permits or financing which limit your options. One extremely valuable thing to remember is that you can apply for and receive these approvals even before you own the property. So long as you have the permission of the current property owner or a valid sales agreement, you can go through the entire approval process before taking on ownership liability at all.

Rule 2 – Sweat the Small Stuff… Performance Standards Matter

It is very important to understand not just the definition of your use, but also the performance standards that apply. Just to take one very straightforward rule, consider all the issues that can come

from a setback requirement. If there is a setback rule that applies to structures, how is a structure defined? Is there a specific definition of "side yard"? If a setback from a road is required, does that apply to an unopened street or abandoned alley? What about easements? What is permitted in the setbacks? Do things like air conditioning units count for setback purposes? None of those are hypothetical questions, and each reflects a question we have been asked to examine on a specific property. There are countless other questions that can be asked for this issue alone, and each performance requirement, whether for landscaping, parking, or stormwater, brings its own set of questions and issues.

Regardless of what is in the zoning ordinance, there is at least one form of relief that is always available: a variance. However, as a variance is a request for relief from a zoning ordinance, the burden for the applicant is very high. We once handled a matter for a developer who had already applied for seven different variances for a single project in the City of Pittsburgh. Besides needing to meet the legal standard for each one, this total list of requested variances gives ammunition to NIMBY ("Not In My Back Yard") groups eager to argue that the needed variances were entirely out of character for the ordinances. This matter was appealed by a NIMBY property owner.

Rather than continuing the appeal, we did a new review of the project, this time with zoning as a key criterion for how the entire project would be designed. After a full review and analysis of the ordinance and the project, we were able to eliminate six of the seven variances to meet the ordinances' performance standards and make minor tweaks to the design that did not impact the core project. This allowed us to clearly articulate that we worked within the ordinance and had designed a project that worked with, rather than fought against, the ordinance. When this new design was appealed, we prevailed in the Commonwealth Court. During oral argument, one judge stopped my argument simply to declare, "My gosh, you've done everything they asked for. What more can you do?" It was no surprise that we won the case and were approved for a large new commercial project in one of the hardest-to-build neighborhoods in the City of Pittsburgh.

Sometimes, no matter how carefully and creatively you review the ordinance, the truth is, your project is just not going to fit with the ordinance as drafted. In this case, the variance option should be considered. If you are going with this option, it is critical that you have sought the minimum variance possible. If you cannot comply with the ordinance entirely, at least showing that you came as close as possible is still extremely valuable.

Rule 3 – The Sunk Cost Fallacy

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But you may find that even seeking a variance is a Hail Mary play. You need to be prepared to walk away. If you do not own the property in question, that may be easier. If you do own the parcel, then you need to look back at the Use Table to see what can be done. Every property has some authorized uses, and if it did not, then you would have an argument that the property has been legally taken by the municipality. Having blocked one project, the municipality may be wary of blocking a second one, particularly if it's well-tailored to the zoning ordinance. You might also consider a substantive validity challenge, a rezoning, or a curative amendment. Avoid tunnel vision and look to the best use that fits the ordinance, even if it is not what you originally planned.

Conclusion

Navigating the complexities of zoning and land use is an essential endeavor for developers seeking success in their projects. It is crucial for developers to adopt a proactive approach to zoning from the very beginning. By thoroughly understanding the specific rules, definitions, and performance standards within each municipality's ordinance, developers can avoid potential pitfalls and align their projects with the local requirements. By working together with your land use attorney, you can avoid the nasty pitfalls of a zoning surprise and spare yourself from getting "the call." **DP**

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