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When are approvals “final” and “unappealable”?

No developer likes risk. But developers of retail projects face unique considerations in deciding when to proceed with an approved project. For example, they may have committed to a certain number of new store openings that dictate an aggressive construction schedule to avoid disappointing investors. Or a particular completion date may be essential to open in time for the holiday season.

When the project receives the necessary zoning approvals, whether in the form of a permit or a formal decision by a planning or zoning board, often the project manager's first question is, “When can I get building permits?” The answer may be “immediately,” but that does not necessarily mean it's prudent to exercise them immediately.

Who Can Appeal

Virtually all zoning decisions, whether an administrative zoning permit or a use variance, carry with them an appeal period during which “interested persons” or “aggrieved parties” may seek review of the permit or approval. Depending on the type of approval, the appeal may be to an administrative body such as a zoning board of adjustment or zoning board of appeals, or it may be to a court. Some jurisdictions have a special land use court, and proposals to establish such a court have been circulating in other jurisdictions.

Appeal Periods

The length of the appeal pe-



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riod varies depending on the jurisdiction and the nature of the approval being appealed, but typically can be as short as 10 days or as long as 60 days. Although the successful applicant can proceed with construction during this period, the work generally is “at risk,” meaning that any improvements — theoretically at least — could have to be removed in the event of a successful appeal.

Some developers as a matter of policy simply refuse to commence construction until the appeal period expires. Others, (hopefully) with full knowledge and appreciation of the risks, elect to proceed even though the appeal period has yet to expire. Often this is a prudent decision, particularly if after a public hearing has occurred with notice to surrounding property owners, no objections have been made.

Developers often presume that once the appeal period

has expired, they are protected and can proceed with their project without risk of appeal. Unfortunately, this is not always the case. Anyone can file an appeal; all an appellant needs to do is submit the required paperwork and filing fee. Whether or not the appeal is timely or has merit is another matter.

Appeals After Appeal Period Has Expired

Although appeals must be filed within specific and limited time periods, under certain circumstances courts may extend them. For example, and subject to variations from one jurisdiction to another, a court may extend the time to appeal where matters of significant public interest are at stake, where circumstances suggest fraud, if a constitutional question is involved, or under the catch-all provision: “where justice so requires.” If the court finds that the person or board making the decision lacked jurisdiction, or if required public notices were defective or never given, a court may hold that the appeal period never commenced, meaning that the applicant has no protection from appeal whatsoever no matter when they are filed.

Late appeals sometimes will be rejected if the appealing party does not commence the proceeding promptly once the party sees that the applicant is making a significant investment in the project through construction. The theory supporting such dismissals is that the appealing

party waited too long to appeal, so to require that the applicant remove the improvements would be inequitable, even if the appeal otherwise might have merit. There are other cases, however, where courts have required removal of buildings because the applicant proceeded in reliance on a permit which the issuing officer or agency had no jurisdiction to issue. These decisions generally are based on the theory that the lack of jurisdiction should have been obvious to the applicant, who therefore could not in good faith have relied on the defective permit or approval.

Developers should proceed with caution when undertaking construction during an appeal period, and even after the appeal period terminates. The best way to reduce the risk of successful late appeals is to make certain that all required procedures for the issuance of the permit or approval have been followed, and that the substantive requirements for approval have been met. Where this is the case, the likelihood of a successful appeal against an approved project should be low.

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