

# Real Estate Journal

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## An attorney questions: What makes a successful retail project?

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From a legal standpoint, a successful retail project is one that proceeds smoothly and efficiently through the permitting process, and which avoids litigation. Although delays are sometimes wholly outside the applicant's control, often there are many steps the applicant can take to ensure that the project receives its approvals as quickly as possible.

### Are Variances Needed?

First, the applicant should examine the applicable zoning requirements to determine whether the project fully complies. If it does not, by identifying the necessary variances the applicant can determine whether the project can be modified both to meet the applicant's objectives and comply with all zoning requirements. If one or more variances simply cannot be avoided, having undertaken this analysis will allow the applicant to gauge the time period necessary to secure approval, determine the past level of receptivity to similar

variance requests, and explain at the public hearing why the variance is truly necessary in order to develop the project.

### Is the Zoning Code Clear?

Sometimes, the design professionals focus most of their attention on setback, parking and other dimensional requirements, but do not adequately focus on the use itself. It can be easy to conclude that the use is permitted when in fact there may be ambiguities in the zoning code that make this anything but clear. For example, if the zoning code permits "restaurants" but defines them as being limited to facilities offering table service, a cafeteria-style restaurant might not be permitted. Yet it would be easy to conclude the opposite without carefully reviewing the applicable definitions.

In other situations, the zoning code could be interpreted in two different ways, only one of which would permit the proposed use. Where this occurs, the applicant should consider seeking a determination or interpretation from the appropriate municipal official or agency, typically the zoning enforcement officer, building inspector or zoning board of appeals. Such a determination can result in an appealable action, which the applicant can then make known to potential objectors through publication, service or posting of notice. If the appeal period ends with no appeals of the decision, the likelihood will be substantially diminished that an objector could later

successfully revisit the same issues. This approach will help identify any opposition early, before substantial funds are committed to an application and hearing process. It also helps to build support among elected and appointed officials so that they will begin to feel invested in the success of the project.

### Focus on Community Benefits

Sometimes opposition does develop, either before or during the hearing process. When that occurs, focusing on the way in which the project will benefit the community, and will be better than potential alternatives, can help decision makers to see the project in a more balanced context. For example, perhaps the project will redevelop an aesthetically unappealing area with an attractive, unified development, or will provide a service that is needed in the community. Where specific impacts, such as traffic, are the principal concern, it can be helpful to demonstrate that the project will have fewer impacts than would result from other permitted uses. If a variance is required, perhaps one justification in support of the variance would be that the project, even though it fails to meet one or more dimensional standards, is still more desirable than some of the other permitted uses.

### Streamlining the Hearing Process

Although the hearing process may seem like it can go on forever, there are steps

that the applicant can take to minimize the number of hearings:

- Address SEQRA at the start of the process. If the project qualifies for an exemption, neither the board nor the applicant has any further obligations. If the project is subject to SEQRA, try to address all the potential impacts by way of a Short Form EAF or Long Form EAF in order to avoid the time and expense of preparing an environmental impact statement.

- Seek special meetings of the board so that it can reach a final decision more quickly. Special meeting fees may apply.

- Ensure that the record made before the board is sufficiently complete to support the decision, even if doing so requires an extra meeting. This could avoid a time-consuming remand for further fact finding in the event of an appeal.

- Once a decision is made, ensure it is properly filed to commence an appeal period.

- If there is no opposition to the project during the hearing process, consider commencing work during the appeal period. Although such work is at the applicant's risk, this will place the burden on anyone filing an appeal to apply to the Supreme Court for an order to stop work.

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