



ENDLESS POSSIBILITIES: A REDEVELOPMENT PRIMER

BY JENNIFER M. BRAGAR

Does your client own underutilized property? The time may then be ripe for you and your client to engage with your local government about redevelopment plans. Land use regulations will govern what may be allowed on the property now and in the future. The easy, but less exciting, proposition is that the local jurisdiction may have no plan to update its comprehensive plan or zoning regulations in the area where the subject property is located. If that is the case, the redevelopment possibilities may be limited to those uses currently allowed, either outright or conditionally. Alternatively, your client may seek a zone change to expand the possible uses that could serve a new or different need in the community. For the purposes of this article, let's explore a local government engaged in a greater community redevelopment effort

over the long term. Cities have done this in efforts to transform hundreds of acres of prior gravel mine lands into employment land or put blighted or underutilized industrial areas to higher and better uses. Port districts may wish to convert waterfront development to mixed-use hubs, and brownfield sites are always ripe for reimagined uses.

COMPREHENSIVE PLAN AMENDMENTS

Many states have enabling statutes allowing local governments to adopt general or comprehensive plans that set forth the policy for land use development that is later implemented under the zoning code. Redevelopment is often encouraged through amendment of the comprehensive plan and can be accomplished through concept plans adopted as part of the comprehensive plan or overlay zones to offer new options for development (or, in some

cases, restrictions). These plans may act as an impetus for redevelopment and support local governments' contemplation and ultimate creation of new zoning designations. Many property owners overlook involvement in this conceptual stage of redevelopment planning, but this is the ideal time for clients and potential clients to consult with an attorney to formulate goals for ultimate redevelopment or sale of property after land use planning changes are adopted.

Zone changes are likely familiar to most property owners, and a variant of the zone change is the use of overlay zones that may focus on favoring one type of development over another without requiring a full-blown zone change that may attract opposition. It is worth examining concept plans in more detail because this is where property owners could lose options or face unanticipated consequences

by not being involved in the local government planning process. Many local governments that undertake concept planning for a redevelopment area will include a public engagement component. Attorneys should be aware of early engagement opportunities for their clients well before a proposed plan is subject to a formal review process by a planning commission, city council, or county boards of commissioners or supervisors. In this way, property owners will have the opportunity to voice opinions and be kept up-to-date on important timelines regarding the approval process for any concept plan. For local government practitioners, this is also the time to create public-private partnerships to work toward successful redevelopment after the planning work is complete. In fact, property owners can trigger an update to existing plans or creation of redevelopment plans by approaching the municipalities with a vision.

The concept plan usually covers several hundred acres and sets forth policy like a mini-comprehensive plan for the redevelopment area. In addition, the concept plan may anticipate a long-term planning horizon. This is the time for attorneys to start to pay attention to proposed language choices in concept plans. Mandatory provisions within a comprehensive plan document, like a concept plan, may have unintended negative consequences for development that will not occur for many years. While neighbors may have a vested interest in the certainty that comes with mandatory concept plan provisions, most developers and local decision makers prefer aspirational goals that leave open flexible approaches.

The COVID-19 pandemic offers a modern example of the need to have a flexible approach. A few years ago, dense office expansion could have been a shared goal of many local governments and developers. However, with the pandemic, businesses are rethinking their office demand models, both in terms of employee-driven demand to continue to work from home and the need to plan

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for healthy outcomes when workers return to work spaces. Thus, mixed-use developments may better anticipate future redevelopment needs to allow full utilization of redevelopment lands and more efficient use of land while anticipating less dense office development. In addition, suburban jurisdictions may need to reconsider existing plans so that they can absorb some office uses that are being driven from larger downtown spaces that have been negatively impacted by pandemic-induced departure of major employers from the downtown core as a result of work-from-home situations and other factors, or social unrest and property damage that have coincided with pandemic impacts.

Once the concept planning is complete, local governments may move forward with an approval package that also includes zoning code amendments, or they may choose to follow the concept plan

with a separate code amendment process. These implementing measures demand equal attention for the lawyer seeking to assist a client in development during uncertain times.

ZONING CODE AMENDMENTS TO IMPLEMENT CONCEPT PLANS

Zoning code amendments based on a concept plan will implement the redevelopment concepts, much like zoning codes are adopted to implement comprehensive or general plans. These code amendments will establish the standards and criteria that will govern land use approvals. For property owners who will redevelop their property, it is imperative to participate in the shaping and language choice for new codes. Property owners need to understand the city's desire to establish approval criteria that give the neighborhood certainty about future development, while developers may need flexibility within the code to maintain the ability to construct a broad mix of uses.

Any participant in code drafting should be sure that height, setback, and floor-to-area ratios will offer enough opportunity to redevelop, or, in the case of project neighbors, enough certainty of what will be built next door to try to avoid future conflict when land use proposals begin to be submitted. In addition, attorneys should be on alert to examine how new areas or zones are dealt with in the approval process. Local government planners may overlook the best way to ensure due process by failing to explore whether current land use approval procedures make sense in a redevelopment area. From the local government's perspective, the creation of new

zone designations with new uses introduced to project neighbors may support expanded public hearings processes. Such hearings would occur before planning commissions making recommendations to the city council or other elected body. Meanwhile, property owners with an eye on redevelopment may prefer less exposure to public hearings in the decision-making process or hearings before a specific body for ultimate decision-making. Moreover, once a proposal is approved, a developer may need to adjust the approval and may need a modified process to do so. Current land use administrative procedure codes may not have contemplated such intricacies and should be considered during any code amendment update.

Well-placed public comment and participation specifically about the code amendment approval process can avoid confusion when the ultimate land use application is submitted and can help to avoid the need to amend the code in the future to accommodate an approval process that works well. For example, where a concept plan is adopted as part of a comprehensive plan, it may be beneficial to have the elected body make decisions in states where local city councils are granted deference in their interpretation of the plan. In contrast, hearings officers are not usually afforded the same deference and could cause problems associated with reduced deference where approval criteria require consistency with potentially subjective concept plans or comprehensive plan policies. However, this reduced deference should be weighed against the potential for streamlined decision-making if only hearings

officer review is necessary.

Once code amendments are made and applications begin to be submitted, it becomes difficult for local governments to adjust the code quickly because of the perception that “fixes” create an uneven playing field, particularly against the first property owner in line for a land use permit. Also, it can take up to a year for a code amendment to pass, so it is important that the local jurisdiction and stakeholders try as much as possible to get the code drafting right at initial adoption to allow for orderly redevelopment to occur.

Be aware of state law governing development agreements.

DEVELOPMENT AGREEMENTS

Finally, any property owner who will be part of a concept plan should consider whether a local jurisdiction is willing to enter into a development agreement to preserve rights prior to the redevelopment or to capitalize on a willingness to help redevelopment occur. Development agreements are contracts between a property owner and local government that may be used to identify an overall development scheme, set forth incentives from the city to entice the redevelopment to occur, and vest the property owner in certain code provisions in the future, even if the local government later amends applicable code.

Practitioners should be aware of state law governing such

development agreements and any common practice by the local governing body in negotiating these agreements. Depending on the complexity of the deal and the resources of the property owner, several months of close negotiation with the local government may be necessary to reach agreeable terms and obtain the best terms. Solo practitioners and small firms can be well placed to negotiate such terms because of their knowledge of local customs and overall development goals of local jurisdictions. This can especially be the case for attorneys with sensitivity to the character of local staff and decision makers, particularly for clients with a global footprint that are not familiar with the local jurisdictions in which they might need land use approvals. In addition, solo practitioners and small firms usually have the ability to work with or help assemble the local consultant team that may be necessary to guarantee that infrastructure is available to serve the ultimate redevelopment of a particular site within a concept plan area or that can help a property owner obtain the right incentives to help a local jurisdiction jumpstart redevelopment.

Most development agreements are approved through a public-hearing process. Thus, the storytelling ability of an attorney can be helpful to clients who need to frame a development agreement in the best possible light for both their own goals and the city’s interest in the redevelopment at hand.

A WORD ABOUT ENVIRONMENTAL CONDITIONS

As the term implies, redevelopment involves property that

was previously engaged in another land use than currently contemplated under a local government's revitalization plans or your client's next intended land use. While this article is framed in consideration of a client's property, much redevelopment involves other people's land or government-owned properties that may be sold or otherwise leased to a developer for redevelopment. If your client is the interested developer, then you must take into account environmental considerations. Phase I and Phase II environmental assessment are typical undertakings if the property is going to be purchased and should be considered for any long-term lease from a governmental entity. Phase I assessments evaluate whether contamination is likely to have occurred; Phase II assessments investigate whether contamination is actually present.

If a Phase II assessment is recommended by an environmental consultant, the results need to be carefully considered by clients in consultation with their attorney, environmental consultant, and remediation experts. Ultimately, clients should assess the risk associated with these results and determine their willingness to move forward. Some environmental concerns can be mitigated, and a careful attorney should advise on risks associated with end uses in connection with a failure of such mitigations. While a cap on contamination may be reasonable for a redevelopment proposal that will not have a lot of people concentrated in an area, it may not be an acceptable mitigation if housing is going to be built on top and there is a risk that hazardous materials could escape a cap.

Redevelopment at port locations, older industrials areas, or on brownfields calls for particular attention to preexisting environmental conditions before you advise a client to move forward on a proposed property acquisition or development.

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Last, there may be shared infrastructure that runs through your client's property. An astute lawyer should consider and draft documents to eliminate risk of the spread of environmental contaminants across such shared infrastructure. These risks should be considered in regard to shared stormwater, water, and/or sewer infrastructure.

While all risks cannot be managed at the outset, environmental considerations must be well understood and vetted because the human health and environmental risks and concomitant damages associated with hazardous substances can far outweigh the value of any conceived redevelopment plan if there is an unexamined problem. Further, federal and most state environmental laws create

joint and several liability unless a prospective purchaser obtains necessary protections by undertaking required due diligence and inspections before purchasing a property. Even then, factual or legal issues may arise that result in potential liability for future damage caused by environmental conditions on a property.

CONCLUSION

The best way for an attorney to be a trusted advisor to clients interested in redevelopment is to have familiarity with the application of state and local land use laws and to maintain an understanding of the complete picture. This includes an understanding of your client's goals within the context of the local jurisdiction's goals and the global context in which we all operate—understanding the global activity of your client, if any, or anticipating pandemic-like impacts to any client interested in redevelopment. Diligence and focus on the overall timeline and goals of your client will help inform the best way to participate early and often in any redevelopment, concept planning, and/or code amendment process that may affect your client's property. Whether your client's project is large or small, the ease with which the client navigates the land use approval process will benefit from participation at every step along the way in forming a local jurisdiction's redevelopment plan. ■



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