

Pursuing a Land Use Outcome, Take One: The Local Land Use Process

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Pursuing a Land Use Outcome, Take One: The Local Land Use Process

In order to develop property, the first step in the process is to seek all required land use approvals. Chief among them is the zoning approval. This is typically obtained at the local (municipal, county, borough, or township) level, and it often involves a public hearing process followed by a final decision. Such final decisions can be legislative or quasi-judicial in character, and the character can affect the form of judicial review. See generally *City of Chicago Heights v. Living Word Outreach Full Gospel Church And Ministries, Inc.*, 196 Ill. 2d 1 (2001). And the opportunity for judicial review exists for applicant, opponent, and zoning authority alike.

Importantly, securing a zoning decision is not the only issue to be addressed. There may be subdivision approvals required that address details of a development's plan and construction. See *Petterson v. City of Naperville*, 9 Ill. 2d 233, 245-46 (1956); see also *City of Urbana v. County of Champaign*, 76 Ill. 2d 63, 71 (1979)(subdivision regulations are distinct from zoning regulations). Drainage and stormwater management approvals must also be obtained. See *Gurba v. Community High School District No. 155*, 2015 IL 118332. Water and sewer services must also be necessary, and these may involve other governmental units. See *Unity Ventures v. Lake County*, 631 F. Supp. 181 (N.D. Ill. 1986), *aff'd* 841 F.2d 770 (7th Cir. 1988).

Likewise, there may be roadway authorities that differ from the zoning authority, and their approvals may be required. If waters of the United States affect the property, then approvals from the United States Army Corps of Engineers may be necessary. See *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). In short, zoning is often the first stop along the way for ultimate development approval, but it hardly the last –which could be an important consideration in resolving any land use disputes.

In a perfect world, a landowner could continue to pursue some of these other approvals even if a zoning decision is contested. Unfortunately, those other approvals require investments of time and money, and they are often dependent on a particular development plan for which zoning approvals have been obtained. As a result, a landowner or developer may be justifiably hesitant about investing the moneys necessary to secure other approvals when there remains great uncertainty over the critical issue of zoning.

Because many of the necessary approvals required for developing land will still need to be addressed even after a successful zoning process (whether before the local zoning authority or in court), those involved in the process should be mindful that there are still many chairs that can be thrown in the path of final development, and any land use conflict can be expanded beyond zoning hearing. Cf. E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* at 3-6 (Dryden Press 1975).

Pursuing a Land Use Outcome, Take Two: Litigation

Because procedural due process underlies governmental action such as zoning, any interested party disappointed with the decision of a local zoning authority can seek further redress in court. Due in part to the uniqueness of land and in part to the contextuality of zoning (and nuisance) decisions, zoning litigation is characteristically very fact-sensitive. See *LaSalle Nat. Bank of Chicago v. Cook County*, 12 Ill. 2d 40 (1957). As a result, it is typically necessary to endure significant discovery and a full trial before a decision on the merits can be achieved in zoning litigation. But see *North Grove Street Properties, LLC v. City of Elgin*, 2016 IL App (2d) 151074-U (motion to dismiss granted because plaintiffs' contradictory allegations in complaint and exhibits on its face established that the local zoning decision was fairly debatable and therefore not unreasonable).

Due to the nature of factors often considered in challenging a local zoning decision, land use dispute depend on detailed factual analyses, see *LaSalle National Bank of Chicago v. County of Cook*, 12 Ill. 2d 40, 46-47 (1957); *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 378 (1960); cf. D. Mandelker & R. Cunningham, *Planning and Control of Land Development* at 111, 132 (Bobbs & Merrill 1979), and these analyses are typically undertaken by expert witnesses. As a result, selecting the team of experts and identifying the scope of issues to be concentrated upon during trial is a critical early step in any land use litigation.

For a zoning authority that is brought into litigation, it is also important to consider various issues relating to justiciability, such as standing, see, e.g., *Village of Willow Springs v. Village of Lemont*, 2016 IL App (1st) 152670, exhaustion of remedies, see, e.g., *Northwestern University v. City of Evanston*, 74 Ill.2d 80 (1978), and timeliness. See, e.g., 65 ILCS 5/11-13-25(a).

Presenting one's zoning case can be a very expensive proposition, and the development of the expert analyses take significant time as well. The combination of time and expense is exacerbated by the opportunities for post-trial appeals. As such, when one embarks upon the journey of land use litigation, it is often a long and rocky trip.

A zoning decision itself may inchoate. A courtroom victory may only address one level of zoning approval, such as rezoning when variations or site plan approvals will still be needed. Thus, the courtroom success may only allow a developer to pursue further zoning approvals.

But even the most successful outcome in a zoning lawsuit does not ensure the ultimate development of the property. As discussed above, zoning is just one of many land use approvals needed before the first shovel pierces the ground. Market demand for a development might have changed during the litigation. Capital markets also may have changed and made financing of a project untenable. Thus, there are many opportunities for opponents to complicate and even make impossible the intended outcome of a development.

In sum, litigation is an option to vindicate development rights, but it is not always an assurance of one's ability to develop, and the delays of zoning litigation may make the economics of a zoning choice made perhaps years earlier no longer desirable.

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