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HEADLINE: Discretionary Land-Use Approvals in a Down Market;
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BYLINE: Howard J. Goldman and Caroline G. Harris, web-editor@nylj.com, Special to the new york law journal

BODY:

With the city's real estate market in the doldrums, there may be opportunities for owners, developers and investors to seek discretionary land-use approvals that, in a more active market, would be too costly or time-consuming.

While discretionary approvals take longer to process and involve more risk than as-of-right approvals, the increase the property value can be substantial.

As-of-Right Approvals

Versus Discretionary Approvals. The types of land-use approvals required to develop real property in New York City can be divided into two categories: as-of-right and discretionary. As-of-right approvals do not involve the exercise of discretion by the approving agency. A prime example is a building permit; if an application demonstrates compliance with all applicable codes, rules and regulations and is in proper form, the Department of Buildings is required to approve the permit.

Discretionary approvals, on the other hand, involve the exercise of judgment by the approving agency. Such approvals

must provide opportunity for public comment and include a reasoned basis for the agency's decision. There are three major types of discretionary approvals: actions subject to the Uniform Land-Use Review Procedure (ULURP); zoning variances; and landmarks approvals.

ULURP

The following actions are subject to ULURP pursuant to 197-c and 197-d of the City Charter:

ULURP formally begins when the City Planning Commission "certifies" that an application is complete. At this point, the application is subject to a public review process that cannot exceed seven months, consisting of consecutive periods of review at the community board (advisory), borough president (advisory), City Planning Commission (binding) and City Council (binding).

However, most of the time spent in ULURP occurs prior to certification, for which there is no clock. In order to be certified, an application must be deemed complete for both zoning and environmental purposes. The environmental review process mandated by the State Environmental Quality Review Act and implemented pursuant to the City Environmental Quality Review program is particularly time consuming.

Over the years, the time required to certify a typical application has substantially increased. In the 1980s, the entire ULURP process could often be completed within a year. Currently, it takes two or more years to complete.

Variances

The Board of Standards and Appeals (BSA) is authorized by the City Charter to vary any provision of the Zoning Resolution, including use, bulk and parking, based upon a hardship.

In order to approve a variance, the BSA must make each of the five findings set forth in 72-21 of the Zoning Resolution. The key findings are that there is a unique physical condition that gives rise to a financial hardship. The other findings concern neighborhood character, self-created hardship, and the minimum variance required to overcome the financial hardship.

Variations are not subject to ULURP. The BSA process is simpler, consisting of review by the community board and a public hearing at the BSA. The pre-filing phase is typically limited to a pre-application conference with the BSA chair followed by preparation of the application. There is, however, no time limit on the formal variance process, which can require several hearings until the BSA is satisfied that the findings can or cannot be made. As a general proposition, the variance process requires about half the time to complete as ULURP.

While this potentially shorter time frame leads many applicants to favor the variance route over ULURP, the BSA will not approve an application unless each of the statutory findings is supported by substantial evidence.

Landmarks

In addition to designating individual landmarks, the Landmarks Preservation Commission (LPC) has been actively creating historic districts throughout the city. Unlike an individual landmark designation, which affects a single property, a historic district designation can encompass many blocks or entire neighborhoods. Once a district is designated, the development or enlargement of all of the lots within the district, including vacant sites and buildings with no landmark merit, require commission approval.

The most common form of approval is a certificate of appropriateness, which is a determination that a proposed development is appropriate to the character of the individual landmark or historic district. The procedure for obtaining a certificate of appropriateness begins with LPC staff review, followed by review at the community board and a public hearing at the Landmarks Preservation Commission. As with the BSA, there is no limit as to when the Landmarks Preservation Commission must act. However, Landmarks actions are exempt from environmental review and can generally be completed in a shorter time frame.

A Landmarks designation also brings with it the opportunity to seek use and bulk waivers by CPC special permit under ULURP. Section 74-711 of the Zoning Resolution authorizes use and bulk waivers on lots within historic districts as well as lots with individually designated landmarks, provided that the underlying floor area ratio (FAR) may not be increased. Another provision of the Zoning Resolution, 74-79, allows individual landmarks to transfer development rights across the street and through a chain of common ownership, one of the few exceptions to the requirement that development rights transfers must be between adjacent lots on the same block.

Conclusion

During a hot market, one, two or more years to obtain a discretionary land-use approval may not be desirable or cost-effective. However, with the market in a lull, now may be a good time to seek discretionary land-use approvals that will substantially increase property values when the market returns. In addition, although not subject to quantification, the city's desire to encourage economic development during a recession may positively affect both timing and likelihood of approval.

Howard J. Goldman and

Caroline G. Harris are partners in the Law Offices of Howard Goldman, a firm practicing exclusively in the area of land use.

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