

Keys to Success in the Discretionary Permit Process

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When you are applying for a discretionary land use entitlement (a zoning permit) there are steps that you can take to increase your chances of success. These permits are primarily conditional use permits (a “CUP”), but can also include zone changes, land divisions, and nonconforming review cases. Discretionary zoning permits are often controversial and take a significant investment of time, energy, and money to make to achieve success.

Here a list of questions that are worth considering if you are in a situation where you may need to discretionary zoning permit. For the sake of convenience, I will just refer to CUPs here, but the same points apply to the other types of permits, and to situations when several permits may be in play.

- 1. Do you have existing entitlements that are active?** If so, preserve them! When you purchase property, do your research on the zoning code and your property’s specific entitlement history. If there are entitlements in place, make sure you understand the time you have to either activate them (by doing the minimal amount of construction to “use” the permit), or by not letting them lapse through non-use. If you have acquired a property that was nonconforming to begin with, preserve that nonconforming status and do not let it lapse (at which time your nonconforming status will expire and you will need to figure out whether a CUP is required, or even possible – if not you may need to discontinue the use altogether). The time frames range from 3 months to 2 years typically, and can be described in different parts of the code (depending on whether it is a

new or existing use) and can also be modified by the terms of the permit. Be careful about doing additions and make sure your approved site plan conforms to what’s on the property now. Also your choices become limited if you happen to do unpermitted work and then you have to tear down the construction or they to legalize it through a retroactive permit.

- 2. Do you truly need the discretionary zoning permit?** Even if you have been told by the local jurisdiction’s staff that this is the permit you need, make sure that you understand exactly the reasons why that is. If you can take steps to avoid needing a CUP, by all means do so. Redesign the project to meet (or be within the allowed threshold) the setback, height, parking, lot coverage or other types of requirements. By being flexible in the site or structure design, you can potential avoid a showdown getting a CUP.

- 3. What are the sentiments of the community?** What is the long range plan for the community? Are there landowners who are planning on developing their properties, especially ones that have the wherewithal to develop (this would include corporations, public institutions like the school district or a hospital)? If there is a plan to update the existing General or Comprehensive (or even local Community Plan), then participate in that planning process. If you are concerned that the outcome of the planning process may be unfavorable to what you have in mind for the use of your property, it may be a good idea to move up the timetable and work on securing the zoning entitlements sooner than later (the

building permits and improvements can wait). The zoning entitlement is key at this stage, however, because it involves community participation which often is not beneficial for a project. If you are able to get policies or plan designations into place that are beneficial to your project or your type of project (i.e. higher density around a transit station), then this can prove beneficial in the future because the jurisdiction's staff will be able to support your plan based on the policies. Projects in many states (California and Oregon included) require that projects conform to the General Plan. The analysis of conformance can vary and may be a bit subjective, but getting to know the plan will help design the right project for the area.

4. Who are the neighbors? Having the support of your immediate neighbors is probably the hardest and most important aspect of proposing a development. It is important that they are in the loop with your plans before you ever go public and file the permit. There are exceptions to this advice of course, but trying to alleviate fears and misconceptions or address concerns outside of the public forum (where it come become a slugfest) is very important. The neighbors may have legitimate specific concerns like access or traffic or noise. Neighbors can be reasonable if you are reasonable as well and some compromises or accommodations are found, especially if there improvements for them as well (such as improved public infrastructure—sewer, roads/sidewalks, water system, lighting, landscaping, etc.).

5. Who is the local community (advisory) group? What is the group of activists, whether formally or informally organized, who the decision-makers will look to for a formal

recommendation? These groups can be called “town councils” or “neighborhood councils.”? There are relatively few people who attend these meetings, but it is well advised to treat these groups with high regard. Arrange to present at their meeting ahead of time (far enough in advance so that it can be put on their agenda and noticed, if need be). Prepare presentation materials for the group. Be willing to come back to a second or third meeting showing how their concerns or questions have been addressed through project design. If there are several groups it may be good to present to some of the less local groups as well, that way letters of support (or at least less active opposition) can be achieved and may offset some other opposition. It is good to get at least some community support (especially formally organized). If it appears the community is entirely against the project, then it puts the decision makers in a tough spot and at that point let's hope your project presents significant community assets or is large enough that it is worth the risk that will convince or provide a leg to stand on for the decision makers to overcome the opposition.

6. What do the local engineers expect? Before you get too far with spending money and effort on a certain property, make sure you that you are prepared to invest in the upgrades, including off-site to meet building and fire codes and that will comply with environmental regulations. These will include the cost of grading (for access or building pads), installing water lines. If your type of use (an “assembly use” in a rural area) requires a private water system or will rely on a septic system, this can be problematic. How far will it be off a paved road? Will you need to install a fire hydrant or sprinklers? Simply put, you may get your zoning

permit because you're building too far away from any neighbors to oppose it, but then you'll be faced with costly land improvements and you'll run out of money before you put up whatever you had in mind.

7. Are your application materials presentable?

Discretionary permits are different from administrative permits – you have a higher bar to convince other people that they should support it. To that end, it really behooves you to spend quality time and get professional help in preparing the application. Work on this end will really pay off in the long-run. Make sure the site plans, elevations, landscaping plans, traffic diagrams are all done properly. Make sure the scale is correct. Make sure that the details are correct so that the local jurisdiction staff can focus on the major points and not have to spend time correcting details. The application materials are a public record and if there is opposition, there is a good chance that the opponents will want to review the file as well and will distribute the information you submitted. Spend good time on the section of the application that asks for the “burden of proof” or the “findings” for approval. Think about how the staff will need to justify the project and check on other cases to see how they've done findings for approval. It's good to refer to attachments and provide the information at length off the application if the application itself does not provide adequate space, which often it does not. Don't take your cues from the application questions, give the staff more information than less and make sure it's professional and accurate and puts your project in the best light. Amend it as you go forward and the scope of the entitlement request may change also.

8. What is the role of staff? Get a feel for what is important to the planner and what the structure is that the planner is working within. Getting the planner's support is important and keep in mind that they will know the project the best and may need to explain and garner support from other stakeholders within the agency, including ones that may be less inclined to support projects. The Planning Department can be more supportive of projects that other departments may not be because the other departments may want to simply avoid issues and are not thrust in the same public role as the planning department. It will be good to meet or make contact with whoever is reviewing your project, including anyone at other agencies. It will not be easy to discover this information, but you should ask who all will be reviewing it and what their contact information will be. Rest assured, while your planner is the one making the final recommendation to the decision-making body, he or she operates within the context of a larger bureaucracy and relies on the technical expertise of a large number of other staff. Be prepared to provide more technical information to the other reviewing agencies directly as the review period progresses.

9. Who will the project benefit? If you're building housing then the future owners or tenants can't show up at the hearing to support it. But if you're doing almost anything else, there are people in the community, including employees, suppliers, and other businesses that benefit or will benefit from your new project. It will be helpful to have those people submit how they feel about the project. It's hard to design a project with zero impacts, it is much easier to design a project that is reasonable and will

minimize the impacts while maximize how it benefits the community.

10. Is this a project you can be proud of?

Specifically, we are talking about aesthetics and green building types of issues. Sure, there are code requirements and findings that have to be made. But beyond that is the matter whether this is the type of project you or most people would want in their community. It is much easier for you or your consultants to sell if it's a wanted project and will allow you to have the staying power to persevere through potentially several years of wrangling. If you really don't want it (and could do it elsewhere) and the community doesn't want it, the process will make this the case. At this point, it's also important to note that even if it is a great project that would benefit the project, there are no guarantees of success. Our landscape is littered with bad projects where good ones could have – and should have gone. Accept that this is the reality of our democratic process that has given us the land use regulation that we have and make sure you calculate this as part of your equation as you make decisions along the way.

By keeping these points in mind while thinking about a project that will require a CUP or another combination of discretionary approvals, it will improve your chances of success or even lead you to conclude this project does not make sense. Developing property can be a rewarding experience, but it can also be more frustrating than it needs to be if the basic investigation and planning is not done ahead of time. It is best to have enough flexibility to let the community shape the project to the extent that it becomes a product of the community, while still being the project you had wanted in that space.