

Greening the Land Development Process

The Implementation of Green Land Development at the Local and State Levels

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Green land development encompasses a broad range of issues that frequently arise during the land development process, e.g. stormwater management, soil erosion control, the required preservation of environmental features including trees, open space, agricultural soils, wetlands and floodplain, and the use of "green" building techniques such as porous pavement and green roofs. None of these issues are necessarily novel to the land development process given the exploding popularity of the green building movement initiated by the Green Building Council's LEED rating system for buildings (Leadership in Energy and Environmental Design). LEED already incorporates many of these issues into the building rating system.

The LEED accreditation program has four possible LEED ratings for buildings: certified, silver, gold and platinum. The more LEED credits a building receives, the higher its rating. Credits are broken down into five categories: sustainable sites; water efficiency; energy and atmosphere; material and resources; and indoor environmental quality.

Currently, a project must obtain at least 26 points or credits to be considered LEED "certified." Significantly, 14 potential credits are available in the sustainable sites category, many of which may already be required in the land development process. In that many of the LEED sustainable site standards are already required or could be easily provided, unwary developers should be aware that they might already be considered "green."

MUNICIPALITY REQUIREMENTS

This article specifically deals with the land development process; therefore, it focuses only on the sustainable sites LEED credits. Whether or not municipalities can require other LEED building standards is not addressed in this article. However, since the Uniform Construction Code (UCC) governs building codes in Pennsylvania, a municipality would not be able to make any substantive changes to its building codes without complying with the UCC. The commonwealth would have to take legislative action to alter the UCC requirements.

The Pennsylvania Municipalities Planning Code (MPC) is the state enabling statute that specifies the powers of a municipality related to the land use process. As a matter of law, if the state enabling statute does not provide for a specific power, then the municipality does not have that power. The MPC provides that zoning ordinances may contain, *inter alia*, provisions to encourage innovation and to promote flexibility, economy and ingenuity in development; provisions to promote and preserve agricultural land, environmentally sensitive areas and areas of historical significance; and pro-



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visions regulating the size, density and design of residential, commercial, industrial and other developments in order to assure the availability of reliable, safe and adequate water supplies. In

addition, according to 53 P.S. sections 10603(g) and (h), a zoning ordinance must contain provisions to protect prime agricultural land; protect natural and historic features and resources; and encourage the continuity, development and viability of agricultural operations.

The MPC also permits a municipality to regulate the subdivision and development of land. It does so by providing that subdivision and land development ordinances may contain provisions for encouraging and promoting flexibility, economy and ingenuity in the layout and design of subdivisions and land developments. This included provisions authorizing alterations in site requirements and for encouraging other practices which are in accordance with modern and evolving principles of site planning and development. It also has provisions encouraging the use of renewable energy systems and energy-conserving building design.

Based on the broad language in the MPC, one could easily argue that a municipality is empowered to incorporate many of the LEED sustainable site credits into its ordinances. For example, LEED Sustainable Sites Credit 1 (LEED-SS-1) requires that no development be located on portions of sites that meet certain criteria. The MPC language allowing for the protection of agricultural land and environmentally sensitive areas certainly seems

broad enough to authorize almost all of the SS-1 requirements.

If a site is classified as an environmentally impaired "brownfield," remediation and development of the property will result in an LEED-SS-3 credit for such remediation. LEED-SS-4.1 awards a credit for locating a project within half a mile of an existing commuter rail, light rail or subway station, or within a quarter of a mile of one or more stops for two or more public bus lines. While a municipality may zone certain areas within close proximity to public transportation for particular uses, it is doubtful that a municipality could require that all development be located in close proximity to public transportation.

The majority of the remaining LEED-SS credits are typical requirements already found in zoning and subdivision and land development ordinances. These requirements include provisions related to parking capacity, protection and preservation of natural areas, maximization of open space, innovative stormwater controls, outdoor lighting requirements and minimization of the "heat island effect," which requires shading and roof design techniques to minimize heat emanating from parking lots and roofs.

As the popularity of green building and the LEED rating process grows, municipalities could incorporate the LEED-SS standards into their zoning and subdivision and land development ordinances without any amendment to the MPC. However, any ordinance enacted by a municipality must still be a valid exercise of the local police power.

Therefore, an ordinance must be rationally related to protecting the health, safety and welfare of the municipality. The ordinance must also not result in exclusionary zoning, which completely prohibits a particular legitimate use.

The point is that while the *content* of the LEED-SS credits is something that municipalities can and are currently regulating, municipalities must nonetheless comply with Pennsylvania enabling authority and governing law. In addition, some of the LEED-SS standards, such as soil erosion control and stormwater management, are typically addressed by and within the jurisdiction of commonwealth agencies, such as the Department of Environmental Protection (DEP). Therefore, a municipality must be careful to ensure that its ordinance does not pre-empt the authority of another agency or provide more stringent requirements than existing state law.

ROLE OF LAND USE ATTORNEY

As in any other complex land development project, a land use attorney should be

involved early and often to analyze whether the municipal ordinances allow for the proposed type of development. If the developer elects to pursue a LEED certification or simply to use a green land development technique not otherwise required by the municipal ordinances, a land use attorney will be an integral member of the project design team. Although some municipalities are on the "cutting edge" of green land development techniques, many are not. Therefore, the project attorney will likely have primary responsibility for informing and educating municipal officials and consultants, as well as preparing the ordinance text amendments necessary to incorporate green building provisions into existing ordinances.

It will not be unusual to find that many municipal ordinances are simply obsolete and badly in need of update even without the desire to incorporate green building standards. Convincing elected and appointed officials to engage in the update process may sometimes prove difficult. Therefore, the land use lawyer will want to resist the urge to be critical of existing ordinances and use some degree of diplomacy and salesmanship instead. Emphasizing the positive benefits of ordinance updates will be preferable to focusing on the negative features of existing ordinances.

Using green land development techniques may provide developers with a valuable alternative to required zoning variance relief. For example, a project may propose a higher-than-permitted percentage of paved surfaces, which because of concerns with the quality and quantity of stormwater runoff would typically necessitate a zoning variance. Such a variance is likely to meet with resistance. However, suggesting an alternative green technique, such as the use of porous paving that allows the infiltration of stormwater into the ground, may be enough to lessen or even eliminate a municipality's resistance to a variance.

While again, some salesmanship and creative arguments may be required, the alternative is perhaps a costly and time-consuming zoning process without any reasonable prospect for success. Good mutual communication and problem-solving between the developer and municipality will often result in both sides achieving their respective goals while at the same time being able to share the credit for a more sustainable solution.

In conclusion, the green building movement is here to stay and the savvy developer will recognize the potential marketing opportunities presented by a properly planned and implemented green land development project. Hopefully, this article has assisted in the demystifying of the nuts and bolts of green land development and that previously wary developers, recognizing just how close they already are to LEED certification, will take the final steps necessary to complete the process. •

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