

What are Approved Plans? and When are They Available?

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We have represented Equity Investors over the last few years providing various related due diligence services associated with real estate development.

The start of our review services usually includes conducting due diligence review of construction related exhibits prepared by others to be attached to the loan closing agreements. Our due diligence process is basically the same for proposed residential multifamily or commercial developments, although there will be technical differences.

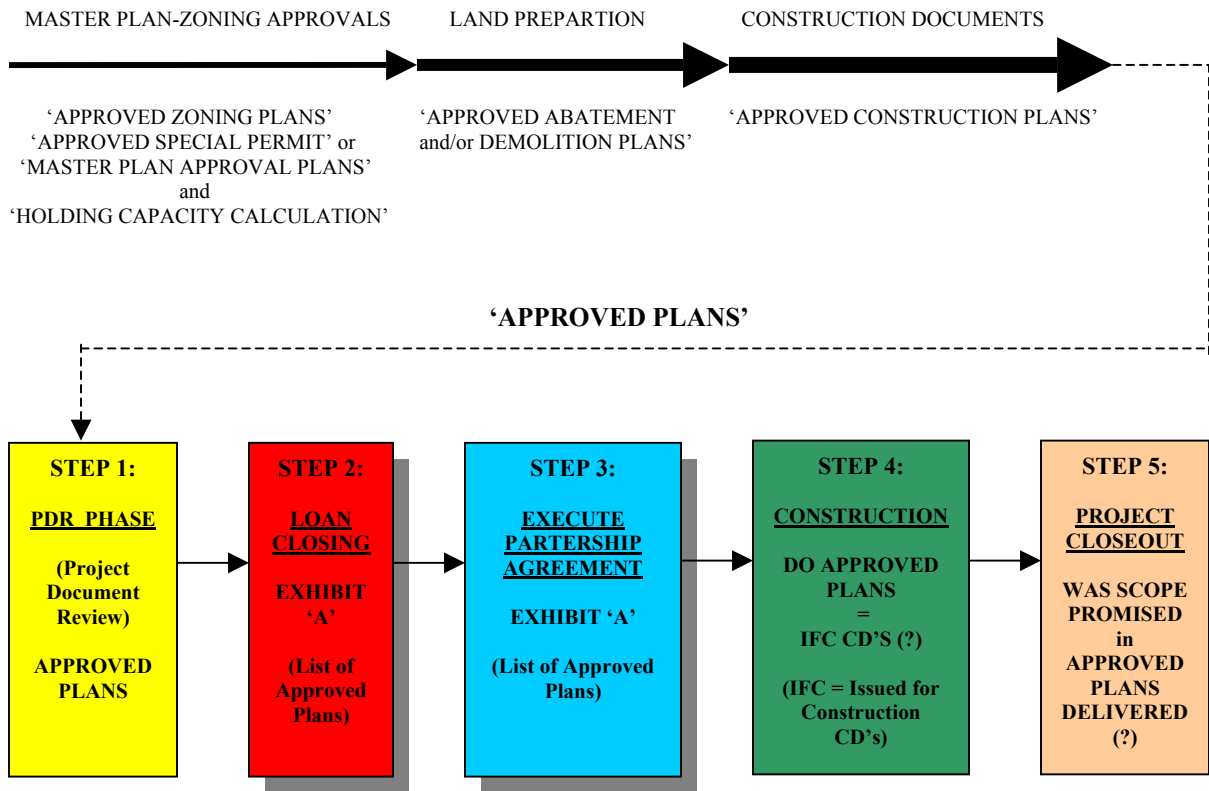
These exhibits also serve to describe the scope of the project promised to be delivered by the developer to the Owner (partnership consisting of the developer and the equity partner).

At the end of our review, and a similar parallel review by the legal team and the lender, the various development agreements need to include a definition of the 'APPROVED PLANS' used to fix the scope of the development project. We have defined this as EXHIBIT 'A' and it lists all construction drawings and the Table of Contents of the Project Manual.

On occasion, we have experienced some difficulty in helping our equity investor clients to obtain complete 'APPROVED PLANS' in a timely fashion prior to the loan closing. This difficulty results in-part, due to honest confusion, as to the use of the term at different points along the path from the start of the development process to final construction. In addition, we find that our required submittals, on behalf of our equity investor, can be a bit more involved than that required by the lender since we are representing more of an owner's perspective.

This article will review our experience with this dynamic and we trust this information will be helpful in establishing reasonable and workable policies and schedules related to obtaining and attaching suitable 'APPROVED PLANS' to your agreements or if you are a member of the A/E Team, in understanding our needs.

It is, therefore, useful to understand the basic phases of the developer's work related to various points in the process where the words 'APPROVED PLANS' serve to describe specific exhibits and associated approvals.



The equity partner may enter this process at any time the developer finds advantageous to obtain equity to support the various development activities. In this paper we are assuming the developer and equity partner have determined they wish to ‘go vertical’. Going vertical is developer-speak meaning the partnership has selected to proceed with construction.

The first step in our work is called the PDR or Project Document Review Phase. This phase usually starts when the equity partner is reasonably confident that the proposed project will be successful based on its internal feasibility analysis and assessment of progress by the developer partner in achieving local permitting and control of the property.

Part of the developer’s responsibilities is to organize and manage the professional consultants necessary to prepare all studies, reports, and documents to complete the proposed project. These professional documents and list of consultants involved, of course, can differ project to project.

The developer must identify and retain all consultants necessary to successfully accomplish the overall project starting with initial market studies to determine the ‘highest and best use’ of the proposed property to be developed.

After this important ‘define the market’ step is completed, the developer moves on to accomplish and obtain any local master plan and zoning approvals, preparation of

construction documents for bidding, obtaining local building department permitting, selection of the contractor and any work necessary to deliver a site ready to start construction (the existing property may need environmental abatement and any existing buildings may need to be demolished).



Many of the multifamily projects we have been involved with Are redeveloping ‘Brownfield’ property containing old industrial Buildings requiring site preparation by the developer; view Above shows old concrete foundations uncovered during Demolition – many were larger and deeper than expected

Building demolition can include prior environmental abatement and an extensive range of old structural systems and materials; demolition requires experienced demo contractors and strict safety standards and procedures

If these types of site preparation activities are necessary the equity partner has an interest in monitoring the specifications and final paper work to ensure that the site is not ‘turned over’ with hidden development costs expected to be resolved prior to the start of the new construction. Therefore, this is the second step in the overall development process where abatement or demolition specifications and/or plans may be prepared and used for bidding. These are sometimes called ‘APPROVED ABATEMENT AND DEMOLITION PLANS’ related to existing site preparation and used to judge if the final condition of the ‘prepared property’ meets the original intent.



This project included the abatement and demolition of old office and industrial facades and all interior building systems down to the basic structural frames on three existing headquarters campus buildings as part of the ‘Base Building Scope’ or renovation work and not as a property preparation pre-development step; some new in-fill and adding a new top floor proceeded installation of all new building systems and curtain wall / window facades.

Since this land preparation process can be lengthy and in order to meet local permitting, master plan approval and zoning approval requirements, the developer usually must retain the services of a Land Surveyor, Geotechnical Consultant and Civil Engineer (and maybe a Landscape Architect consultant). These consultants are retained to prepare the various required submittal exhibits including plans, estimates, and technical specifications and to possibility to offer testimony in public hearings.

The ‘APPROVED ZONING OR SPECIAL PERMIT PLANS’ usually consist of Geotechnical Report and Recommendations, Civil Engineering On-site plans including storm drainage improvements, parking, roads and driveways, any off-site Civil Engineering utility or traffic improvements, architectural site plan with building locations, landscaping and site lighting.

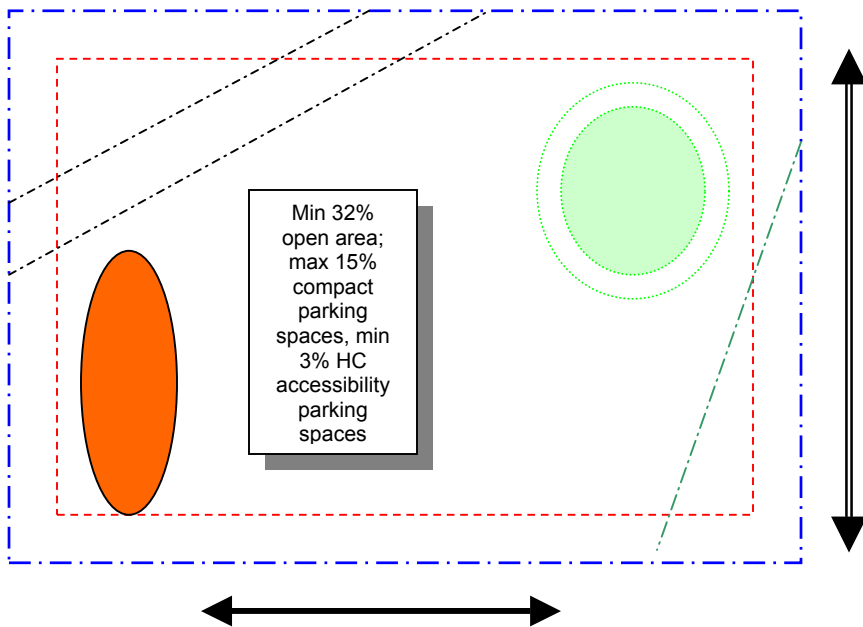
The involvement of the Architect at this point may only involve schematic level site planning including defining the expected building ‘footprints’ and locations and other descriptive information. For example, if the project is a residential multifamily unit the Architect needs to accomplish sufficient work to be able to provide site planning and calculations of the ‘HOLDING CAPACITY’ of the property including unit mix and total count plus associated parking supply count and breakdown into each parking space size. This ‘holding capacity’ calculation is one of the critical factors used by the developer and equity partner in determining feasibility.

Related to this critical calculation of the ‘holding capacity’, we have on occasion, encountered situations where the architect feels that its scope of responsibility for making such a calculation is limited. This usually involves a lack of understanding between the developer and the Architect and Civil Engineer as to the scope of work for each consultant and some lack of involvement of simultaneous work as to timing. It is also our experience that not all architectural firms provide the same depth of services.

For example, if the form of the Developer-Architect Agreement has used the standard AIA Document B151-1997 (Abbreviated Standard Form of Agreement Between Owner and Architect) the Architect may feel that Article #4 *Owner’s Responsibilities* (see sub-article 4.4) means that the Owner needs to provide all survey, zoning, deed restriction, boundaries, rights-of-way, easements, encroachments, contours, etc. prior to starting any meaningful site planning and associated calculations of ‘holding capacity’.

Some of this information will be provided by other consultants retained directly by the developer (the Civil Engineer, Surveyor, Geotechnical Consultant, Traffic Consultant and Wet Lands Environmental consultant are usually not part of the Architect’s prime agreement but have direct agreements with the developer) and some information is issued by local governmental agencies. Therefore, the developer needs to be very attentive in providing the ‘management glue’ that coordinates the work of these consultants and in providing the information the architect needs to start the site planning analysis.

The following rectangle will serve as our property for a proposed multifamily development project. What is the ‘holding capacity’ or real buildable area of this property?



The **dashed blue line** is the property line, the **dashed red line** will represent the local zoning or yard setback requirements, the **dashed black line** will represent a utility easement, the **two green circles** will represent a small wet lands and associated buffer zone, and the **orange circle** will represent a zone of poor soil with associated high development costs, the **double black line and arrows** will represent a regional bike and hiking trail or opportunity, and the **thick black double arrow** line will represent a traffic access constraint from an adjacent local street (new driveway must be located for new entrance to and from property anywhere within arrow).

The **green dashed line** represents a zoning line which divides the property into two property ‘use zones’, the smaller portion in the lower right hand corner is zoned R2 and the balance of the property is zoned C1 and the **text box** represents a series of zoning requirements that are expressed as performance standards for the C1 zone.

Clearly given this set of constraints, opportunities and interactive performance standards combined with the overall ‘development market objectives’ set by the developer, the architect needs to determine the actual net ‘buildable area’. We find some architects consider this a ‘site planning’ study outside the scope of their AIA Agreement.

After the actual ‘buildable area’ of the property is determined, the architect should prepare site plans to illustrate the range of ‘reasonable alternatives’ available for development of the property within this portion of the overall property. The developer then needs to conduct its internal studies and evaluation of the advantages and

disadvantages of each alternative and select the ‘preferred alternative’ for more detailed site planning study and local permitting.

At the time the developer feels this local permitting has progressed to the point it is likely to be successful, it will then direct the full Architectural-MEP Engineering team to proceed to prepare their final detailed construction documents (the term construction documents is sometimes misunderstood – CD’s consists of drawings and the Project Manual – the Project Manual is usually a bound book consisting of the General Conditions and technical specifications following the 16 division CSI format).

We are often asked by the developer in the first few days of our work in the PDR Phase to provide, on behalf of our equity partner, a summary list of the construction related documents to be submitted for review leading up to the loan closing. This conversation always has a certain tension attached since generally speaking development timeline schedules are often time consuming due to complex local permitting. Due to concern over market dynamics the developer desires to start construction as soon as possible and does not wish to add to the already long list of items to complete prior to actual turning the first ‘spade of earth’ at the groundbreaking.

Therefore, we have developed a generic submittal checklist to aid in responding to this request; however, each project has a different set of realities that should be discussed before the generic list can be modified to fit the project at hand. At the same time the various attorneys involved in the loan closing agenda will have their own legal checklist and a few items will be common to both lists, however, our checklist is more focused on the documents related to the construction of the project.

One of the first exhibits requested by the attorneys is EXHIBIT ‘A’ (mentioned at the start of this paper) to be attached to the various development agreements and to serve as the ‘APPROVED PLANS’.

As the team works to reach the ‘closing of the loan’ and the start of construction we have experienced a further ‘trade off’ that needs a fuller understanding by the entire team.

Often just prior to the scheduled ‘closing date’ the developer will request the Architectural-Structural-MEP Engineering team to print a so-called ‘PERMIT SET’ to support application of local building permits. These partially completed drawings (but complete enough to have the professional license stamps attached per local state laws), are often also marked with the words ‘NOT FOR CONSTRUCTION’. These are combined with the Civil Engineering and Landscape drawings to make up the Building Permit Application. The application is likely to be submitted to the local Building Commissioner and Fire Department while our review is still in progress so we are also given the ‘Permit Set’.

In some cases, we have experienced that the developer also proceeds to use the ‘Permit Set’ to began bidding to obtain more defined and up-to-date construction costs.

The 'trade-off' is that the 100% completed set of A-S-MEP drawings may not be available before the scheduled 'loan closing'. In this case the 'Permit Set' becomes the 'APPROVED PLANS' described in EXHIBIT 'A' attached to the development agreements.

The potential problem is that post closing when 100% completed and fully coordinated A-S-MEP CD's are issued marked 'ISSUED FOR CONSTRUCTION', the drawings may include 'scope creep' from that defined in the 'PERMIT SET'. If this 'scope creep' is found to be significant, there can be a delay between the 'loan closing' and the actual start of construction since the contractor will expect to be paid for this 'scope increase' and the ownership may not wish to start the project by using some of its precious 'hard cost contingency' so early in the project (it is rare that the 'scope creep' is found to be a cost decrease).

The use of the words 'APPROVED PLANS' appears to be a simple definition, however, the entire development team and their consultants need to make sure that the definition at the various phases is clearly understood to ensure efficient and effective working relationships and successful projects.

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