

# Negotiating the Entitlement Minefield

*Because family entertainment centers are a relatively new phenomenon, FEC developers often must plead their case when it comes to zoning, building codes, and environmental issues.*

**E**ntrepreneurs are marvelous creatures. Nimble as the gazelle, they leap the hurdle of finding an acceptable and affordable property for their family entertainment center. Swiftly sidestepping the morass of capital and financing, entrepreneurs dash toward a finish line that represents repeat business, the right mix of attractions, and profitability . . . only to fall head-first into the minefield of entitlements.

Commonly referred to separately as zoning and permits, entitlements have blown more than a few entrepreneurs out of the water. Because the FEC concept is so new, many levels of government have yet to create zoning classifications and building codes for family entertainment centers. Thus, developers who fail to perform a thorough "due diligence" investigation of entitlements early on may end up with a project that is delayed, over budget, or simply kaput.

Entitlement land mines fall into three general categories: zoning, environmental, and building code. Requirements vary by governmental jurisdiction, each of which has its own customized laws, codes, rules, and regulations. Even worse, requirements overlap among different jurisdictions. What the city, township, or county says is perfectly fine may be a major no-no according to state or federal law.

Any or all of these jurisdictions

may have different sets of requirements dealing with the different aspects of your project. Zoning may be handled through City Hall, building codes administered by the county, plumbing and fire codes checked by the state, health codes enforced by the county or state, and environmental laws overseen by the city, county, state, and federal government. The level of complexity varies by location as well.

Here is an overview of the many entitlement issues the White Hutchinson Entertainment Group in Kansas City, Mo., has encountered while helping clients develop FECs throughout the United States, and during 25 years of developing commercial real estate. This analysis isn't all-inclusive, but these examples will alert entrepreneurs to the types of obstacles they will encounter during a due diligence check.

## ZONING

Zoning laws and regulations keep people from building steel mills in subdivisions. They cover the right to use property for specific purposes, and a typical property will have a zoning classification that permits a list of these uses. Often, within a particular zoning classification, additional uses will be permitted by "special exception," which can be vital to FEC developers.

Special exceptions require an appearance before a zoning board and

often, later, before a city council. Special exceptions are discretionary and never guaranteed. They may be granted for a limited time, with renewals requiring new hearings. Sometimes, exceptions are referred to as permissive uses, in that you can use the property only for specified uses.

Zoning laws and regulations can be as detailed as a *Where's Waldo* cartoon. They contain specific requirements for such items as minimum set-backs, parking, floor-area ratios, landscaping, and more. Sometimes, exceptions from a particular requirement can be obtained with a "zoning variance," which also requires a hearing.

The zoning classification required for outdoor FECs and small parks is usually clear, as most ordinances have provisions for outdoor facilities with miniature golf, go-karts, driving ranges, and rides. Sometimes, "special use district" zoning is designated, which requires developers to submit a specific site plan to get the required zoning. The site plan then becomes the zoning and cannot be changed without dashing back to square one for another hearing. This kind of zoning can be expensive and risky, because the detailed final development plan has to be finished before the zoning application is submitted.

But outdoor facilities have it easy compared to indoor FECs, a new animal in the wonderful world of zoning. Indoor FECs, soft modular play, and

# Outdoor facilities have it easy compared to indoor FECs, a new animal in the wonderful world of zoning.

pay-for-play children's centers are rarely addressed specifically in zoning ordinances. Some jurisdictions will interpret zoning laws to allow indoor FECs in the same zones as bowling or skating centers, and some in retail commercial zones. Others treat them like outdoor FECs. Still others take the most conservative approach—treating them like amusement parks, especially if they have rides requiring industrial or special use zoning.

Parking requirements, too, can be an explosive issue for indoor FECs. Since indoor FECs are not usually listed as a land use, the zoning officials will probably interpret regulations in a way that is safest for them and least favorable to the FEC developer—by requiring parking based on an assembly occupancy use, such as a theater. There have been cases where an indoor FEC was required to build twice the amount of parking as a retail center—15 parking spaces per 1,000 square feet of building in one case. While FECs require a bit more parking than retail, that's just silly. Such requirements may destroy any chance of finding a site that's acceptable or make an indoor FEC too expensive to develop.

There are solutions, however. If the FEC is part of a complex of buildings with common parking, such as a shopping center, and if the adjoining occupancies do not have peak parking demand at the same time as the FEC, the amusement facility may qualify if the zoning has a provision for what is called "shared parking." A second route is to seek a variance from parking requirements. To do this, the burden is on the FEC developer to present evidence at a hearing that shows the zoning requirements are an economic hardship and that reduced parking requirements will not create a problem for the surrounding community.

Operators of coin-operated video, redemption, and kiddie rides have special problems. Many zoning laws

require exceptions for coin- and token-operated games. Some restrict them to heavy commercial or industrial zones. Others allow a limited number. Still others prohibit them. In New York City's boroughs, for example, under the "common show" law, only four games are allowed per center, except in some heavy industrial zones.

Although they may not fall under zoning laws, other state laws can limit many types of coin-operated devices, particularly redemption. Some states interpret redemption games as gambling devices and prohibit them. In most of New Jersey, the only legal way to operate redemption is to have the games dispense a fixed number of redemption tickets after the token is inserted but before play begins. Because many FECs rely on video and redemption to complete a profitable mix, it is important to check this out during the due diligence investigation.

### ENVIRONMENTAL LAWS

Environmental laws run through every level of government, from city to federal. The areas included in environmental legislation include traffic impact, storm-water management and quality, sediment control, noise, exterior lighting, air pollution, dust control, wet lands, protected and endangered species, and hazardous waste and toxic chemicals.

Environmental laws usually apply more during property development and are less of a concern if the FEC

owner leases an existing building. Some laws can even apply to reuse, however. For example, a traffic impact study might be required to convert an industrial building to an FEC.

No matter how carefully developers check the minefield, though, explosions happen. On a FEC development project in California, the problem wasn't that the outdoor FEC would create air pollution. Instead, the children who would play there are classified as "sensitive receptors" under state law, and the question was whether they would be exposed to harmful levels of air pollution from a nearby freeway.

In another project, storm-water management was the problem. Because the off-site drainage area was almost flat and the outfall high, an oversized storm-water management pond had to be created, since pond depth did not add storage capacity.

### BUILDING CODES

Let's say that, despite some tense moments, you've managed to negotiate two-thirds of the minefield. You've gotten variances and special exceptions, you've managed to avoid irreparable damage to the FEC's immediate environment, and you're ready to renovate the building you have leased. Now it's time for the

by Randy White

# FEC Entitlements

budget-buster: building codes.

Again, it's the indoor FEC that is hardest hit. A building that was formerly occupied by a retailer may not be the straightforward remodeling project it seems. The problem is that the building codes used most frequently in the United States—BOCA and UBC—don't have a category for FECs (neither does the Uniform Plumbing Code). That means (sigh) that once again you must plead your case to avoid unreasonable requirements.

Permit officials will conservatively label FECs as places of assembly, calculating a possible occupancy of one person for every 15 square feet or so. Although you'd have to drape folks over the *Skee-Ball* machines to jam that many in your FEC, the building code assumes the same high density as a movie theater or auditorium.

So why sweat this particular detail? What's the big deal if the authorities think you'll squeeze in at least twice as many guests as you really can at one time? The problem is that occupancy determines the number, location, and size of exits, the sprinkler fire flow, the size of the rest rooms and number of fixtures, and the classification of the required construction and types of building materials. While your female guests might thank you for the excess toilets, it doesn't make economic sense to build rest rooms so large they could serve the crush of customers you would get during a concert intermission.

Resolving the problem often means negotiating a maximum occupancy for your FEC that's less than if it were assembly-based. Also, the plumbing administrator will sometimes recognize that the rest rooms don't need to be sized to meet a peak intermission demand, and some plumbing codes allow for such variances.

What remains are architectural construction issues, because the FEC will have a higher occupancy than a previous retail use. This includes additional exits, changes to the con-

struction classification, and additions or upgrades to sprinklers to increase flow. If you're lucky, the sprinkler main will be large enough to accommodate the upgrade; but if not, you might need to install a new water line out to the public main.

One issue that surfaces with soft modular play equipment is fire safety. Fire marshals often require an evacuation plan for this equipment. At its peak, some units will hold more than 200 children, and evacuating 200 panicky children in an emergency is no easy task. The ASTM committee in Philadelphia is currently struggling to establish nationally accepted standards that address soft modular play evacuation design and procedures.

Older buildings may also harbor land mines for inexperienced FEC developers. Remodeling may require that the structures and systems be upgraded to current code requirements for new construction, apart from any changes needed to accommodate use as an FEC. This can include upgrading the entire electrical distribution system or structural retrofits to meet earthquake or wind requirements.

When an existing building is expanded, building construction types can pose a major problem. The original building construction type may no longer qualify for the larger enclosed area you need. This problem can be solved only by upgrading the existing building and developing fire doors or other fire separations between the two spaces.

In the United States, any renovation to an existing building requires ensuring access to disabled people. The Americans with Disabilities Act (ADA), as well as some state and local regulations, require that the entire building meet ADA Title III standards for new construction. Under these laws, doors must be adapted to accommodate the disabled—even if the doors are already there.

Many view the ADA as more of a nuisance than an opportunity—at

first. They complain about having to comply, believing that they will not have enough disabled customers to make the renovation worth it. But remember: if a guest in a wheelchair can use the place easily, so can a parent or grandparent with a child in a stroller. Accessibility also can be profitable. Five years ago, White Hutchinson managed the design and development of a 32,000-sq-ft center. Although the center was pre-ADA, the client wanted a facility that was fully accessible and user-friendly not only for guests in wheelchairs but for hearing- and speech-impaired guests. Today, 5 percent of the center's customers are disabled, a decent return for a minimal investment in creative design.

Knowledgeable commercial designers can save headaches when it comes to other elements regulated by building codes: furniture, fixtures, and finish materials. The codes often require commercial grade materials and construction; evidence that all components meet flame-spread and toxic-fume ratings will need to be submitted prior to the issuance of an occupancy permit.

Problems with entitlements can cause budget overruns, delays, or even abandonment of development altogether. A thorough due diligence investigation, conducted early on by someone who is experienced and supported by a knowledgeable design team, can save a lot of grief and money. It is easy, when faced with the paperwork, the headaches, and the sometimes-capricious nature of regulators, to forget that many of these laws and codes were created to prevent problems down the road. The right team can help you create an FEC that is safe, sound, and worry-free for you and your guests. **fw**

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