Developer bound by predecessor's promise in permitting process

Pledge not to include 'uplights' referenced in final plan

By: Eric T. Berkman August 31, 2017

The developer of an apartment complex was bound by a promise the prior project owner made during the special-permit approval process that there would be no decorative "uplights" on the high-rise building, a Land Court judge has decided.

The special permit authorizing the project included a condition that all "use, building construction, and site plan development" substantially conform to the "Final Development Plan." The promise not to include decorative uplights appeared as a single sentence in the two-volume plan, which was incorporated by reference in the permit. Uplights were otherwise allowed by right in that particular zoning district.

The plaintiff developer, who installed the lights after receiving permission from a city official, claimed it was unaware of its predecessor's promises and argued that it should not be held to a single-sentence pledge in a voluminous document.

Judge Michael D. Vhay disagreed, speculating that if uplights were not allowed in that district by right and the plaintiff's predecessor incorporated in its plan a single sentence stating that the project would have uplights, the plaintiff would expect to be able to enforce that provision.

"The saw about the goose and the gander applies here," Vhay said. "[I]f an applicant offers an express promise in a special-permit application that can become, as a matter of law, the municipality's approval for the project, the municipality likewise may enforce the promise, if it expressly incorporates the application as a condition of a special permit."

However, instead of ordering removal of the lights, as the city's Board of Zoning Appeal had ruled, Vhay ordered that the developer be given the opportunity to go before the Planning Board, which had granted the permit, seeking an amendment to allow the lights.

The 18-page decision is *Monogram Residential 22 Water Street Project Owner, LLC v. Alexander, et al.*, Lawyers Weekly No. 14-070-17. The full text of the ruling can be ordered here.

'Ignorance no excuse'

Vali Buland of the Cambridge City Solicitor's Office, who represented the defendant zoning board members, said the decision affirms that ignorance of a final development plan's contents is not a legally sufficient basis for not complying with it.

"In this case, the former owner's representation that there would be no uplighting of the roof of the building was important to the surrounding neighborhood," Buland said.

At the same time, Jonathan M. Silverstein, a Boston attorney who represents municipalities in land use cases, said it was "surprising and concerning" that the court opted to allow the developer to seek modification of the special permit.

"If conditions were always subject to modification or application by the developer and a decision on such an application subject to judicial review, the requirement that permit conditions be immediately appealed or complied with would be nullified," Silverstein said, referencing the Supreme Judicial Court's 2009 ruling in *Wendy's Hamburgers of New York, Inc. v. Board of Appeal of Billerica, et al.*

In the *Wendy's* case, the SJC indicated that review of a modification request should be limited to situations in which there are changed circumstances justifying the modification.

"There is no indication here [of] any such changed circumstances that justify the modification, and it is difficult to conceive of any for a lighting condition like this," Silverstein said.

But Christopher G. Senie of Brewster, who represents developers in land use disputes, said allowing the developer an opportunity to seek modification was the correct step.

"Our courts do not favor economic waste, and thus will and should allow a sufficient time to cure the illegal implementation of the granted permit with an application to modify the permit," he said. "The [permit-granting authority] might deny the modification request if such denial is legally tenable. The neighbors will certainly have a chance to weigh in during this new public hearing, which is essential."

Boston attorney Christopher R. Agostino said the decision should remind developers to be careful during the permit-approval process, since anything they show on their plans or specifications can constitute an enforceable condition if properly referenced in the permit.

"While permitting agencies generally request more plan detail and finality prior to issuing an approval, developers in a rush to secure a permit may provide details that could unnecessarily bind them to conditions they did not thoroughly consider," he said.

Boston real estate litigator Michael K. Murray agreed that the case underscores the importance of reading the special permit and its conditions carefully, and if the conditions refer to a plan, to get that plan and read it as well.

“If the Final Development Plan had said nothing about uplighting, there wouldn’t have been a problem,” he said. “The problem was that the plan specifically said, ‘We will not have this feature.’ Then the next developer changed its mind.”

Additionally, Murray said, the decision shows that when a plan prevents a developer from doing something it wants, the developer must follow the formal steps for getting an amendment. And developers should not assume that if they fail to do so — or they rely on a municipal official’s promise that it is OK — they’ll get a second opportunity, like the developer in this case.

“You never know for sure what’s going to happen,” he said. “Not every court will allow that opportunity.”

The developer’s attorneys, Jean L.R. Kampas and Sarah A. Turano-Flores of Hyannis, declined to comment.

“If the Final Development Plan had said nothing about uplighting, there wouldn’t have been a problem. The problem was that the plan specifically said, ‘We will not have this feature.’ Then the next developer changed its mind.”

— Michael K. Murray, Boston

Controversial lighting

In February 2010, real estate developer Catamount Holdings applied to the Cambridge Planning Board for a special permit under Chapter 40A to build a 392-unit residential complex.

In its application, Catamount included a narrative statement with a sentence promising not to light the building’s screens or roof. The narrative made it into the Final Development Plan for the project.

In June 2010, the Planning Board granted the special permit. The permit contained a condition requiring “all use, building construction, and site plan development” to be in “substantial conformance” to the Final Development Plan.

Ten months later, Catamount sold the unbuilt project to plaintiff Monogram Residential 22 Water Street Project Owner.

During construction, Monogram decided it wanted to install decorative uplights to illuminate the screens around the top of the building. But before installing them, instead of seeking an amendment to the Final Development Plan, Monogram sought approval from the city’s commissioner of inspectional services, who was responsible for zoning enforcement.

In its request letter, Monogram pointed out that uplights were permitted by right in that district under the zoning ordinance. The letter did not mention Catamount's promise in the plan not to use them.

Several months later, the commissioner told Monogram by email that the lighting was allowed.

When Monogram installed the lights in January 2016, neighbors complained to the city. Meanwhile, an opponent discovered the narrative containing Catamount's pledge and informed the commissioner, who later told Monogram that the lights had to be removed.

After the zoning board ruled on appeal that the lights had to go, Monogram filed suit in Land Court arguing that the ruling was unreasonable.

Enforceable promise

Vhay rejected Monogram's argument that it was unreasonable to hold it to its predecessor's promise.

"Monogram offers no authority for the proposition that a purchaser of an already-permitted development must be given a fresh opportunity to challenge a permit condition before the municipality may enforce it," the judge said, adding that that applies to all promises in a final development plan, "even the terse ones."

Vhay also rejected Monogram's argument that even with the uplights, the building was in "substantial conformance" with the Final Development Plan, to which the complex generally adhered.

"Monogram's reading of [the operative condition] might be correct if [the condition] read, 'The Project shall be in substantial conformance with the Final Development Plan,'" Vhay said. "But [the condition] has three subjects: 'use,' 'building construction,' and 'site plan development' — and mandates that 'all' of those subjects be 'in substantial conformance with the Final Development Plan.'"

Finally, Vhay found that the commissioner had no authority to approve the lights. Still, the judge concluded, instead of Monogram having to immediately remove the lights, the city must give Monogram a "reasonable opportunity to obtain any permit necessary" to keep them.