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Pitfalls in reviving an unfinished development project

December 31, 2014 - Northern New England

As we continue to slowly shake the economic doldrums, developers are picking up the pieces of failed or unfinished development projects throughout New Hampshire. By their very nature, these types of projects come with "warts," one of which is sometimes a prior denial of a permit or approval by the local planning board or zoning board of adjustment that was never appealed. A relatively recent (but unpublished) New Hampshire Supreme Court case, Paz v. Hampstead, highlights a significant potential pitfall a developer may face in reviving a project with this history.

In Paz, the developer was attempting to complete a dormant retail project and presented a site plan application to the town planning board. In 2001, the planning board had denied site plan approval for a similar project. When the developer submitted a new proposal in 2012, a group of abutters opposed the project, contending that the new project was "functionally identical" to the 2001 project and "nearly indistinguishable" in design. Relying on a 1980 decision in a Zoning Board of Adjustment case (Fisher v. Dover) that held that an applicant may not re-apply for a variance if the application is substantially the same as a previously denied application, the abutters argued that the new site plan application should be denied.

The planning board, however, determined that the 2012 plan was materially different from the 2001 proposal and granted site plan approval. The abutters appealed to Superior Court, which upheld the approval, a decision affirmed by the Supreme Court.

While this was quite good news for the developer, the decision presents troubling implications and illustrates a few important lessons.

First, since Fisher, it has been unclear whether applications before a planning board are held to the same standards as applications before the zoning board of adjustment, where a previous application was denied. There is no New Hampshire law squarely addressing this issue and planning boards in different municipalities have developed various approaches. In Paz, the court recognized the lack of law on this issue, but nevertheless ruled assuming, but without deciding, that the Fisher decision applies in the planning board context. Because of this, planning boards may continue to rely on Fisher to deny a new site plan application because it is not materially different from a previously denied site plan.

Second, the Paz decision, turned on very specific factual circumstances. Key to the decision was the fact that the plans changed from a two-story, 6,400 s/f building to a 4,800 s/f single-story building, together with architectural changes, reorientation of the building on the site to lessen the impact to a nearby residences and a reduction in the number of parking spaces. Under a different set of facts, with less substantial variations in the plans, the outcome could have been different. Unless and until the Supreme Court is willing to find that Fisher does not apply in the site plan context, and given the deferential treatment the courts give to findings of fact by a planning board, a decision denying a new application because of substantial similarity with a prior application is likely

to be upheld.

Because of the continuing uncertainty that Paz left unresolved, it is imperative to look carefully into a property's history before attempting to revive a stagnant project. Due diligence should include a thorough review of the municipal records to see if there was a previous denial of site plan approval or any type of zoning relief related to the project site. If so, and the proposed plans are similar to plans that had been previously rejected, then the project team can take steps to minimize the potential problem. For example, a key to the developer's ability to overcome the problem in Paz was building a solid record before the planning board documenting the specific changes made to the earlier proposal.

In taking over an unfinished development project, a developer needs to know all of its warts and implement a strategy to deal with them effectively. Engaging experienced legal counsel to undertake the necessary due diligence and work with the project team to avoid the many pitfalls associated with these types of projects is highly recommended.

I give special thanks in preparing this article to my colleagues, David Rayment and Mark Derby, who successfully represented the developer in the Paz case.

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