

Success in Phases

By MARK A. KABLACK

A recent Supreme Judicial Court (SJC) decision, *Lobisser Building Corp. v. Planning Board of Bellingham* (June, 2009), reaffirms the right to multi-year construction phasing



within the lapse period of a special permit issued under M.G.L. c.40A, Section 9. The decision upholds a prior landmark ruling in the

case of *Bernstein v. Chief Building Inspector and Building Commissioner of Falmouth*, 52 Mass. App. Ct. 422 (2001). The *Lobisser* ruling is important to any phased development, particularly in the current economic period, where future phases may be delayed to accommodate marketing, financing, and other construction-related issues.

Phased developments occur frequently, particularly in larger condominium projects, and have long been recognized as an appropriate development tool to stage construction in order to better respond to market conditions. Massachusetts Condominium Law (M.G.L. c.183A) specifically sanctions phased condominium development, allowing for the developer (sometimes referred to as the declarant) to phase in additional units over a period of time expressed within the project's Master Deed. When a new building is added or phased in, the developer records a phasing amendment to the Master Deed, adding the new building and units to the total unit count already in existence. If phasing is not completed by the deadline stated in the Master Deed, the phasing rights are relinquished by the developer for the benefit of the condominium association of unit owners, which in turn may, by unit owner vote, revive phasing rights and grant such rights to third parties for future construction and phasing of units.

At issue in *Lobisser* is whether the right to construct future phases may be limited by the statutory requirement under M.G.L. c.40A, Section 9, to commence substantial use or construction within two years after a special permit is issued (which period may be shorter, but not longer, based upon a local bylaw or ordinance). The project in the *Lobisser* case was approved in 1985 by special permit from the Bellingham Planning Board for the construction of eighty-four townhouse units. The special permit included several conditions, including the requirement to submit plans in annual phases, and limiting the number of units that may be constructed in any one year. A cumulative building permit schedule provided for a total number of units that could be constructed over a four-year period beginning in 1987 and ending in 1990.

In connection with the special permit, construction of Phases I and II occurred in accordance with the stated conditions, noting in particular that construction commenced in 1986 (within the one-year period required by the Bellingham bylaw). Subsequent phases, however, were not commenced in annual installments. There were a number of significant delays associated with future construction, including a sewer moratorium, and the eventual termination of developer's phasing rights as set forth in the Master Deed. No further action related to the project occurred until the fall of 2005, at which time the condominium association voted to revive phasing rights for the construction of the remaining units and granted such rights to a new third-party developer. The new developer filed applications with the Bellingham Planning Board to modify the original special permit and to grant approval of development plans for the remaining units. In response, the Bellingham Planning Board denied the requests on the grounds that the special permit had lapsed. This decision was appealed by

the developer to the Massachusetts Land Court, where a Motion for Summary Judgment was ruled upon in favor of the town, prompting the appeal, and resulting in the current decision by the SJC after granting direct appellate review.

The SJC decision, authored by Chief Justice Margaret Marshall, reversed the Land Court ruling and upheld the validity of the original special permit. In its ruling, the SJC made particular note that M.G.L. c.40A, Section 9 makes use of the disjunctive "or," stating that only commencement of substantial use or construction is necessary within the prescribed time period, not both. The SJC also rejected arguments by the Town that substantial use or construction had to occur for each phase within the lapse period, or that there must be design, construction or other such overt act regarding future phases within the lapse period. While the SJC noted that in the *Bernstein* case substantial use had in fact occurred for future phases, as a result of construction and use of sewer infrastructure, such use was not a prerequisite for vesting rights in the special permit. In *Lobisser*, where initial construction had commenced within the lapse period of the Bellingham bylaw, the original special permit remains valid, despite construction delays associated with subsequent phases.

While the SJC affirmed the importance of phased projects in light of complex development plans and market realities, it also recognized the reality that special permits should not be warehoused forever. The SJC stated that municipalities may, within the powers of imposing conditions, safeguards and limitations on time or use, restrict the delays in phased construction by including an express time limitation in the permit. There must, however, be a clear outside date. The SJC rejected Bellingham's argument that the requirement for annual plan submissions and the cumulative building permit cap was tantamount to a

four-year deadline for construction completion. The SJC ruled that the annual plan submission made no sense if no construction was underway, and a cumulative building permit cap was just that, a maximum rate of development.

The *Lobisser* case is important to landowners, builders and developers of multi-year phased projects because it affirms the applicability and vesting rights of the original special permit. The ruling, however, can be narrowed in scope by special permit condition, if a permitting board imposes an express outside date for phasing completion. Permit applicants should be wary of such conditions and make sure that an outside date accommodates a reasonable construction delay period.

Lastly, the applicability and vesting rights of a special permit will not render a project immune from future zoning amendments. Under M.G.L. c.40A, Section 6, “construction or operations under a ... special permit shall conform to any subsequent amendment of the ordinance or bylaw unless the use or construction is commenced within a period of not more than *six months after issuance of the permit* and in cases involving construction, unless such *construction is continued through to completion as continuously and expeditiously as is reasonable* (emphasis added).” Therefore, a developer may conceivably have a valid special permit for multi-year phased development but still need to comply with interim zoning amendments. ◆

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