LAW OF THE LAND

Developers get guidance on variance lapses

Recent case law may provide some relief for developers concerned about lapsing permits

BY THOMAS BHISITKUL

The lapse of a variance is a troubling issue for a real estate developer. Variances are subject to stringent legal standards that are difficult to meet, and obtaining a variance can involve protracted, expensive (in both monetary and political capital) and sometimes venomous proceedings before local zoning boards of appeal (or, worse, litigation). The risk of lapse of variances (and other development permits) is an increasingly urgent problem for real estate developers who have stalled projects due to lack of financing and/or adverse market conditions.

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Now there is a significant recent case in Massachusetts that may give some developers protection against (or, perhaps, even a temporary safe harbor from) the risk of losing their variances to lapse while they continue to wait for this grim market cycle to run its course.

In the case decided this past year, *Cornell v. Board of Appeals of Dracut*, 453 Mass. 888 (2009), the Massachusetts Supreme Judicial Court provided some long-overdue guidance on the actions a developer must take to "exercise" a variance to prevent it from lapsing. Under the Massachusetts Zoning Act (G.L. c. 40A, §10), a variance will lapse one year from the date of grant unless "the rights authorized" thereunder are "exercised." One vexing problem is that the statute does not define the term "exercised," which has created ambiguity as to what types and levels of activity will be sufficient to meet the "exercise" threshold.

Imagine a hypothetical developer who holds a variance to construct an office building on its site in violation of minimum zoning setback requirements. If the developer actually constructs the building in the otherwise prohibited location, there is little question that the variance has been "exercised." But, what if the developer cannot proceed with construction of the building, due to financing or other constraints? Can some set of activities short of actual construction be sufficient to constitute "exercise" of the variance? What if the developer had completed the building foundation — is that enough? What if the site had only been excavated, but no construction has taken place? What if no actual site work at all has been done, but the developer has obtained other permits and approvals that were necessary for construction (e.g., a building permit, site plan approval, order of conditions, subdivision approval, etc.)? These types of questions have plagued developers with projects in imperfect states of completion on the one-year anniversary of their variance grant. Until the *Cornell* case, there was very little case law on this issue to help develop the meaning of "exercise" through judicially created standards.

While not answering all of these questions, the Court in *Cornell* has now established at least a few concrete standards to guide developers on this issue:

ACTUAL CONSTRUCTION IS NOT A PREREQUISITE

The significance of this principal is highlighted by comparison with lapse standards applicable to other development permits, such as building permits and special permits, which require that construction be (at least) "commenced" within the lapse period. Given the significantly higher degree of difficulty and cost to obtain a variance in the first place, and given the paucity of available construction financing in the current market, the Court's application of this more liberal standard to prevent the lapse of a variance is a major benefit to developers.

THE ISSUANCE OF A BUILDING PERMIT FOR DIMENSIONAL VARIANCES IS SUFFICIENT

In *Cornell*, the Court established that obtaining a building permit is the watershed moment when a variance holder "realize[s] the benefits of the variance" (the court reasoned that a building permit is "the culmination of the permitting process" which allows the variance holder to "utilize" its property "in a way that does not otherwise conform with the applicable zoning provisions"). In fact, the Court's ultimate holding in the case what that the variance in that case had lapsed because the variance holder had not "at the very least" obtained a building permit.

CONVEYANCE OF A NONCONFORMING LOT IS SUFFICIENT

Cornell also affirmed that when a variance has been granted to build on a nonconforming lot, the conveyance of that lot in reliance on the variance is sufficient to exercise the variance. This would apply where, for instance, a developer wanted to subdivide a tract of land into two or more building lots, but (due to site constraints) is unable to create those lots in conformity with applicable zoning requirements. If the developer obtains a variance to building on those otherwise nonconforming (unbuildable) lots, the developer's sale or conveyance of one or more of those non-conforming lots would be sufficient to "exercise" the variance.

OTHER PRELIMINARY PERMITS/APPROVALS ARE NOT SUFFICIENT

The *Cornell* case also established that the developer's expenditures of time, effort and money to obtain other types of permits and approvals within a typical permitting process are not sufficient to "exercise" a dimensional variance. In *Cornell*, the variance holder had hired consultants to perform wetlands delineation, to prepare a septic system plan, and to prepare an ANR plan (a type of subdivision plan), had submitted applications for an order of conditions and a septic system approval, and had obtain approval of the ANR plan during the one-year lapse period (but, notably, did not obtain a building permit). The Court held that all of the permits and approvals sought by the variance holder were not sufficient to exercise the variance, but, rather were "essentially preliminary to the issuance of a building permit."

Thus, developers who have obtained variances, but have not completed the full permitting process as necessary for the issuance of a building permit, are at risk of having their permit lapse (if, however, the developer can clearly demonstrate that one or more of the permits could not have been obtained "but for" the variance, a valid argument could be made that obtaining the interim permit was sufficient to exercise the variance).

VARIANCE PERIODS CAN BE "EQUITABLY TOLLED"

Although discussed in dicta, the Court in *Cornell* further indicated that the one-year lapse period may be tolled where, due to circumstances beyond the developer's control, delays are encountered that prevent the holder from obtaining a building permit within the one-year lapse period. Thus, for instance, if the variance is appealed and the developer is tied up in litigation for several months or years, the variance may be tolled due to the practical impediments created.

Notably, the Court established clearly that, in order to assert that a variance has been equitably tolled, the developer must have sought a statutory extension of the variance (under the Zoning Act, a variance holder can apply for an extension of the exercise period for up to six months). Accordingly, if a developer holds a variance but cannot (despite the developer's diligence) obtain a building permit due to legitimate delays in obtaining all other permits and approvals that are prerequisites to the building permit, then the variance may protected by tolling of the lapse period. ■

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