Developers No Longer Need to Undertake Any Active Construction to Save a Variance from Lapsing.

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Beginning construction, or even simply breaking ground, is no longer necessary to exercise rights under a use variance. Last week, the Appeals Court clarified what qualifies as an "exercise" of a use variance, finding that the developer had "exercised" a use variance even without putting a shovel in the ground. In Green v. Zoning Board of Appeals of Southborough, the issue was whether a use variance lapsed pursuant to G.L.c.40A, §10, which requires it be "exercised" within one year of their grant, despite the fact that the developer was still going through the local permitting process. The Court held that actions taken to satisfy any condition of a variance, even if not all conditions are satisfied, will likely be viewed as exercising those rights in the eyes of the court.

The Southborough Zoning Board of Appeals granted a use variance to developer Park Central but made it subject to sixteen conditions, one of which stated that the variance would be "effective only following final board approval" of a comprehensive permit application. Fifteen months later, well outside of the 12-month time limit imposed by G.L.c.40A, §10, the ZBA approved Park Central's comprehensive permit application.

Opponents to the proposed project brought an action in Superior Court after the town denied a request to declare that the variance had lapsed. The Superior Court dismissed the case on the grounds that the plaintiff had not exhausted all of his administrative options. The Appeals Court likewise ruled in favor of the ZBA and Park Central, but did so based on the merits of the case.

In determining whether the variance had lapsed, the Appeals Court first held that rights under a variance can be exercised (as required under c. 40A, §10) before the variance becomes legally effective (when recorded) and even before all of the attached conditions have been fulfilled. The Court went on to clarify what it means to "exercise" rights under a variance. It found that evidence of any use in reliance of the variance within one year of issuance can be sufficient to qualify as "exercise." Here, incurring consulting fees and engaging engineers, wetland specialists, and other professionals to redesign and modify a development plan in accordance with the comprehensive permit condition qualified as "exercising" the rights under the variance. Efforts and expenditures made in connection to fulfilling a condition of a variance (in this case, efforts to obtain a comprehensive permit) qualify as "exercising" the rights. So the court held that the variance had not lapsed, even though no physical work on the project had begun.

With this broadening interpretation of what qualifies as "exercising" variance rights, we anticipate that it will be more difficult for project opponents to argue that any variances have lapsed. This ruling is important information for both developers and municipalities alike.

As always, if you have any questions on this case or related topics, please do not hesitate to contact any of our Public Law lawyers