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## Special permits are still special – the impact of the Lobisser decision

By Paul F. Alphen, James M. Burgoyne and Charles N. Le Ray

On June 22, 2009, the Supreme Judicial Court clarified the meaning of language in Section 9 of the Zoning Act, G.L.c. 40A, concerning the lapse of special permits. That language provides that:

“Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than two years, which shall not include such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause.”

In *Lobisser Building Corp. v. Planning Board of Bellingham*, 454 Mass. 123, 907 N.E.2d 1102 (2009), the SJC reversed a decision of the Land Court holding that a special permit for the construction of an 84-unit condominium project lapsed when construction was suspended, ultimately for approximately 18 years.

In 1985, the Bellingham Planning Board granted the original developer a special permit, which limited the rate of build-out to 21 units per year, that is, required at construction to occur in at least four phases.

The Bellingham Zoning Bylaw provides that special permits lapse after 12 months unless substantial use thereof, or construction, has begun, except for good cause. Forty-one units were built by 1988, after which construction ceased.

In 2006, the condominium association and a new developer, Lobisser Building Corp, sought to modify the special permit to build 21 units in Phase III. The Bellingham Planning Board denied their request on the ground that the special permit had lapsed when construction ceased.

On appeal, the Land Court held that the special permit had lapsed under G.L.c. 40A, §9 and the Bellingham Zoning Bylaw. The court held that the substantial use or construction test applied to each phase of construction, not to the overall special permit. The decision did not make clear whether the court determined that substantial use or construction for all phases had to begin in the first year, notwithstanding the special permit’s prohibition against starting the second or later phases in that year, or if the test was to be applied to each of the four phases in four successive years.

The defendant, Bellingham Planning Board, was represented by Attorney Jason R. Talerman and Lobisser Building Corp. was represented by Thomas O. Moriarty, president-elect of REBA. Three amicus curiae briefs were filed in support of the plaintiffs, including one from REBA and The Abstract Club, co-authored by James M. Burgoyne and Charles N. Le Ray, co-chairs of REBA’s Land Use and Zoning Committee and Paul F. Alphen, former chair of the Committee and past president of REBA.

Had the Land Court’s decision been upheld, special permit granting authorities might have felt empowered to interpret G.L.c. 40A, §9 as requiring that construction of every phase of a multiphase project begin within two years, or such shorter lapse period as might be specified by the local zoning code. Additionally, had the decision been allowed to stand, it would have been difficult for construction lenders or their counsel to determine the period of validity of a special permit in advance of full construction, which could seriously (further) chill the construction finance market in Massachusetts.

The SJC found that the Land Court had determined that the special permit lapsed when one year passed and “substantial use ‘of the type that would preserve development rights to phases III and IV under the special permit has not commenced.’”

No construction of roadways, common areas or infrastructure for the final phases had commenced prior to the expiration of the lapse period (or since!) The SJC ruled that only the “commencement of substantial use or construction,” not both, is necessary to avoid a lapse. The SJC took pains to explain that the word “or” is disjunctive in this context and either the commencement of construction OR commencement of substantial use of the special permit, and not each phase of the project, is all that is required to avoid a lapse.

However, the court distinguished between a lapse of a special permit by way of the statute and expiration of rights under a permit by condition, which the board had power to limit but chose not to. Seasoned practitioners sometimes ask the permit granting authority to define in the decision the activities that must be accomplished within a particular time period to avoid a lapse of the special permit.

Previously, the leading case on the subject was *Bernstein v. Chief Building Inspector of Falmouth*, 52 Mass. App. Ct. 422 (2001), wherein the Appeals Court held that despite an extended pause in construction before commencement of the fifth phase of a condominium project pursuant to a special permit, “where a developer anticipates completing work in stages, has begun construction within two years, and a ‘substantial use’ has commenced, authority to complete the project continues absent express language to the contrary in the permit.”

In *Bernstein*, however, the developer had constructed a septic system for the delayed fifth building during the two-year lapse period.

Thus, *Bernstein* left unanswered the question of later phases for which neither use or construction begins within two years (or a shorter period specified by local zoning) of the issuance of a special permit.

In *Lobisser*, the SJC further refined the standard created within the *Bernstein* decision by concluding that “... nothing in the statute suggests that substantial use or construction for each phase of the project had to begin within one year. Indeed, reading the statute this way would make no sense.”

Furthermore, the court stated that “nothing in §9 indicates that each phase of the project is subject to its own lapse period. Once a special permit for a project, phased or otherwise, has been approved, all that the statute requires is that substantial use or construction commence within the applicable lapse period, which cannot exceed two years.”

Perhaps the most powerful expression by the court is found in the following statement: “Here, where construction of the project began within one year of special permit approval and where the special permit contains no time limit, there is no basis to conclude that the special permit has lapsed,” citing *New Seabury Corp. v. Board of Appeals of Mashpee*, 28 Mass. App. Ct. 946, 948 (1990).

REBA and the Abstract Club argued in their amicus brief that, “By requiring developers to frontload the costs of infrastructure for future phases into the initial phase(s), such a rule will deter the creation of large-scale, phased residential (or commercial) projects, thereby encouraging smaller, discrete projects that, in the aggregate, consume more land and provide fewer opportunities for affordable residential development.”

The brief also pointed out that this reading of section 9 was unlikely to lead to the “warehousing” of permits, as failure to continue construction through to completion as continuously and expeditiously as is reasonable would leave a project subject to subsequent zoning changes under Section 6 of the Zoning Act.

Typically, an application for a special permit is only the first stop along the land use permitting gauntlet. It is a logical first stop because if the proposed use is not allowed as a matter of right, it would be wasteful to expend significant sums on environmental scientists, engineers, architects, attorneys and loan applications without first having obtained permission to bring the proposed use to the subject land.

Once the special permit is issued, a project proponent often must seek an Order of Conditions from the Conservation Commission; obtain site plan approval or definitive subdivision approval; obtain necessary permits for road openings; submit an Environmental Notification Form to the Massachusetts Environmental Policy Act Office; obtain permits related to the provision of water and sewer, which often requires significant engineering by the applicant and substantial review time by the Department of Environmental Protection; satisfy the requirement of the Natural Heritage and Endangered Species Program; and submit the necessary documentation to a lender and complete applicable borrowing requirements.

Having to work toward completion of these processes and to begin construction of all project phases within two years would have been the death knell for larger phased projects.



ALPHEN

*Paul Alphen, Jim Burgoyne and Charles Le Ray authored the joint REBA /Abstract Club Amicus Curiae brief in the Lobisser case. They are all members of REBA's Land Use and Zoning committee. Alphen, who practices with the firm of Balas, Alphen & Santos in Westford, can be reached at [paul@lawbas.com](mailto:paul@lawbas.com). Burgoyne is a director of the Worcester-based firm of Fletcher, Tilton & Whipple and can be contacted at [jbargoyne@ftwlaw.com](mailto:jbargoyne@ftwlaw.com). Le Ray is a founding partner of Brennan, Dain Le Ray, Wiest, Torpy & Garner in Boston. He can be reached at [cleray@bdlwtg.com](mailto:cleray@bdlwtg.com).*



**BURGOYNE**



**Le RAY**