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Extinguishing restrictive covenants imposed as a condition of zoning approvals - by Forchelli and Snipas

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Courts have long upheld the imposition of restrictive covenants as part of zoning approvals. As a result, boards routinely require applicants to record restrictive covenants as a condition of zoning approvals. Due to the fact that restrictive covenants are often drafted to “run with the land”, meaning the covenants automatically transfer with the property, zoning attorneys should be fully versed in drafting restrictive covenants as well as the available legal remedies for modifying or extinguishing restrictive covenants.

Restrictive Covenants Should Be Drafted to Protect the Applicant’s Interests

Courts are reluctant to add or modify restrictive covenants after they have been recorded. As the Court of Appeals held in Collard v. Inc. Vill. of Flower Hill, “[w]here language has been chosen

containing no inherent ambiguity or uncertainty, courts are properly hesitant… to imply additional requirements to relieve a party from asserted disadvantage flowing from the terms actually used." 52 N.Y.2d 594, 604, 421 N.E.2d 818, 823 (1981). As such, a prudent zoning attorney should be heavily involved with drafting the restrictive covenants.

For example, in Collard, the Village of Flower Hill conditioned its amendment to its zoning ordinance on the execution of restrictive covenants by the property owners that no construction could occur on the property without the consent of the board of trustees. Id. at 818. The board of trustees subsequently, without any reason, denied an application to enlarge and extend the existing structure on the property. Id. at 820.

The applicants filed an Article 78 proceeding seeking an order from the court to issue the building permits in part on the grounds that the board of trustees' denial was arbitrary and capricious. Id. The applicants' position revolved around its argument that the board of trustees could not unreasonably withhold consent. Id. at 823. However, the court looked to the plain language of the restrictive covenants and refused to insert the additional language. Id. As such, in the absence of language in the restrictive covenants to the contrary, the board was permitted to unreasonably withhold consent.

The decision in Collard instructs zoning attorneys to always try to include a clause that allows for the modification or extinguishment of the restrictive covenants under certain defined conditions. Many times, clients purchase property with restrictive covenants that are irrelevant to the proposed use but cause difficulties with the proposed development until such restrictive covenants are terminated. To avoid such a problem, zoning attorneys should advocate for a clause in the restrictive covenants stating that the covenants are in effect until the termination of the approved use that the restrictive covenants relate to.

Extinguishing Covenants Through the Real Property Actions and Proceedings Law

In the event that restrictive covenants do not contain a clause allowing for modification or extinguishment either because the municipality refused to agree to such a clause or the restrictive covenants are already in place, there is a section of the Real Property Actions and Proceedings Law that allows for the elimination of restrictive covenants that are no longer applicable to the property or serve no benefit to the party seeking to enforce it.

Specifically, New York's Real Property Actions and Proceedings Law Section 1951 (RPAPL 1951) allows for the extinguishment of non-substantial restrictions on the use of land. Pursuant to RPAPL 1951(1), "a restrictive covenant shall not be enforced if, at the time enforceability of the restriction is brought into question, it appears that 'the restriction is of no actual and substantial benefit to the persons seeking its enforcement or seeking a declaration or determination of its enforceability either because the purpose of the restriction has already been accomplished or, by reason of changed conditions or other cause, its purpose is not capable of accomplishment, or for any reason." New York City Econ. Dev. Corp. v. T.C. Foods Imp. & Exp. Co., 19 A.D.3d 568, 569, 797 N.Y.S.2d 549, 551 (2d Dep't 2005) quoting N.Y. Real Prop. Acts. Law § 1951 (McKinney). The party claiming that

the covenant is unenforceable bears the burden of proving that the covenant should be extinguished. New York City Econ. Dev. Corp., 19 A.D.3d at 569; Blue Island Dev., LLC v. Town of Hempstead, 143 A.D.3d 656, 659, 38 N.Y.S.3d 255, 258 (N.Y. App. Div. 2016). However, courts strictly construe restrictive covenants against the party seeking to enforce them. Herald Square S. Civic Ass'n. v. Consol. Edison Co. of New York, 8 Misc. 3d 1024(A), 803 N.Y.S.2d 18 (Sup. Ct.), aff'd sub nom. Herald Square S. Civic Ass'n v. Consol. Edison Co. of New York, 307 A.D.2d 213, 764 N.Y.S.2d 240 (1st 2003); see also Etkin v. Hyney, 32 A.D.2d 704, 299 N.Y.S.2d 862 (3d 1969) (“In construing conveyances containing covenants running with the land, the authorities uniformly hold that restrictive covenants must always be construed against those seeking to enforce them.”).

For example, in Blue Island Dev., LLC, Blue Island Development purchased land in the Town of Hempstead (“Town”) and petitioned the Town Board for a change of zone to permit a condominium development. 143 A.D.3d at 657. The Town Board granted the change of zone but required Blue Island Development to record certain restrictive covenants on the property. Id. In particular, one of the restrictive covenants required Blue Island Development to sell all of the proposed units as condominiums but permitted any subsequent owners to lease the units. Id.

As demand for rental units throughout Long Island began to increase, Blue Island Development sought to modify the restrictive covenant preventing it from leasing the units. Id. In 2010, the Town Board modified the restrictive covenant to permit 17 of the proposed 172 units to be leased for five years after the issuance of the certificate of occupancy or until the delivery of title to the 155th unit. Id. In 2013, the Town Board denied a further request to rent more units beyond the 17 units permitted in 2010. Id.

Blue Island Development commenced an Article 78 proceeding in which one of its causes of action sought a judgment declaring the restrictive covenant limiting the number of rental units invalid and unenforceable pursuant to RPAPL 1951. Id. at 658. The court agreed with Blue Island Development’s position that the restrictive covenant was “of no actual and substantial benefit to the Town.” Id. The matter was remitted to Nassau County Supreme Court where the Supreme Court ordered that the original and modified restrictive covenants were invalid and unenforceable. In re Application of Blue Island Development, LLC v. The Town of Hempstead, No. 35332014, 2017 WL 849956, at *3 (N.Y. Sup. Ct. Jan. 25, 2017).

Although RPAPL 1951 provides a method for relief from a restrictive covenant, a more efficient way to proceed in the first instance would be to attempt to terminate or modify restrictive covenants from the party who would attempt to enforce them through negotiation without the costly expenses of litigation. In these instances, attorneys negotiate with local officials or others who would enforce the restrictive covenants to have them terminated and RPAPL 1951 is then available if negotiations fail.

It is important to note that restrictive covenants vary with property on a case-by-case basis. If you are a property owner seeking to extinguish a restrictive covenant, you should contact an attorney familiar with the legal complexities of restrictive covenants and RPAPL 1951.

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