

Donna M. Jennings, Esq.
Wilentz, Goldman & Spitzer, P.A.

AN ACTION TO QUIET TITLE IS NECESSARY TO LIFT A CONDITION RECORDED IN A DEED RESTRICTION



During the land use approval process the reviewing board often grants an approval subject to the imposition of certain conditions. An applicant is usually so thrilled to secure an approval that they readily agree to the imposition of said conditions. Unfortunately, these conditions may impact a property owner's ability to develop its site in the future. Careful consideration should be given to a condition that would restrict or prohibit future development of an applicant's property. An applicant should be especially cautious about agreeing to place

a condition in a deed as a restrictive covenant.



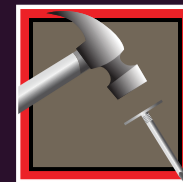
Generally, an applicant is permitted to return to the reviewing Board for a modification of its prior approval or for removal of earlier imposed conditions. In those circumstances, an applicant must demonstrate that "changed circumstances or other good cause may warrant reconsideration by the local authorities." Allied Realty, Ltd. v. Borough of Upper Saddle River, 221 N.J. Super. 407 (App. Div. 1987), cert. den. 110 N.J. 304 (1988). However, if the condition is placed in a deed the proper remedy is to institute an action to quiet title.

In a recent case entitled Care One at Teaneck, LLC v. Zoning Board of Adjustment for the Borough of

Teaneck, the court ruled that Care One's proposed development ran afoul of a no-build restriction contained in a deed. In 2003, Care One applied to the Zoning Board for permission to operate a 128 bed skilled nursing facility on property located in a residential zone. A nursing home is not a permitted use in that residential zone. Recognizing the inherently beneficial nature of the proposed use, the Board granted Care One use variance relief subject to a condition that it would subdivide out a parcel and deed restrict that parcel from development in the future. The purpose of the deed restriction was to create a permanent buffer between the nursing home use and the adjoining residential uses. In the Board's Resolution it specifically found that the use variance would not have been granted but for the deed restriction and some other conditions. The subdivision contemplated by the approval was implemented by deed. The deed specifically recited that the subdivision was subject to a restriction that that parcel would remain forever vacant.

“Next time you are involved in a matter before a municipal land use board think twice before agreeing to place a no-build restriction in your property deed.”

In 2008, Care One applied to the Board to convert the deed restricted parcel into a paved parking lot.



The purpose of the application was to provide 27 more parking spaces for the employees. The Board initially refused to take jurisdiction relying on Soussa v. Denville Township Planning Board, 238 N.J. Super. 66 (App. Div. 1989).

In Soussa, plaintiffs secured major subdivision approval to allow nine building lots on a portion of their property. The approval was granted on condition that the remaining 20.22 acre parcel be unavailable for future subdivision and that future development be limited to one single family residence. Plaintiffs executed a deed to themselves which contained the restrictive covenant. Ten years later plaintiffs filed an application to subdivide the 20.22 acre parcel contrary to the deed restriction. Defendant Board determined that it lacked jurisdiction to hear the subdivision application which would violate the deed restriction. The Appellate Division agreed that the defendant Board could not override the restrictive covenant whose beneficiary was the public and since neither the planning board nor the governing body could eliminate the covenant in the deed, plaintiffs' remedy would be by way of an action to quiet title. *Id.* at 68-69. *See also American Dream at Marlboro, LLC v. Planning Bd. of the Township of Marlboro*, 209 N.J. 161 (2012) (Planning Board lacks the power to eliminate a deed restriction because a public's third-party beneficiary status entitles the public to maintain an action to enforce it; only the courts have the equitable power to modify or terminate such a restriction). Subsequently, Soussa applied to the Court to have the covenant lifted but the Judge found that changes which had occurred since the imposition of the condition in 1977 made the restriction even more desirable

for the protection of the public good and entered judgment in favor of the Township.

In Care One, the court explained that to eliminate a deed restriction “. . . the essential test that applies to such a claim of changed circumstances requires the applicant to demonstrate that it has become ‘impossible as a practical matter to accomplish the purpose for which a servitude or restrictive covenant was created.’”

Ultimately, in Care One the court ruled that the applicant failed to establish its entitlement to have the restrictive covenant against any development of the vacant buffer lot nullified. The purpose of the buffer was to assure the Board and the adjoining neighbors that there would be in perpetuity a substantial buffer between their homes and a non-residential, non-conforming nursing home facility.

The mere fact that there were changes in the healthcare industry that may have increased the parking demands for Care One's facility were not enough to overcome the need to buffer the non-residential nursing home use from the adjoining residential neighborhood.

Next time you are involved in a matter before a municipal land use board think twice before agreeing to place a no-build restriction in your property deed. You will not be able to return to the Board to lift said conditions. Instead you will be required to file an action to quiet title in the Chancery Division of the New Jersey Superior Court.

Disclaimer: This article is for general information only and is not legal advice or counsel.



About the Author



Donna M. Jennings, Esq., is a Shareholder on the Land Use Team at Wilentz, Goldman & Spitzer, P.A. in Woodbridge, New Jersey. She represents developers and redevelopers in all phases of land use approvals, and related environmental and regulatory matters, as well as litigation and appeals involving the approval and permitting process Ms. Jennings can be contacted at 732-855-6039 or djennings@wilentz.com.

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