



Demystifying The Conditional Approval Process

COURT CASE CLARIFIES EFFECTIVE TOOL FOR BREAKING ADMINISTRATIVE LOGJAMS

BY BETH BRYAN CRITTON

Whenever development of real property requires multiple permits from multiple agencies, the issue arises: Which agency goes first? Misunderstood or not properly managed, this question can result in an endless tail-chasing game in which permits are denied because all others have not yet been obtained.

The recent settlement of *CMB Capital Appreciation Inc. LLC v. Planning and Zoning Commission of the Town of North Haven*, 124 Conn. App. 379 (2010), leaves intact the guidance provided by the Appellate Court regarding the availability and appropriateness of “conditional approvals” as one way to resolve the potential stalemate of which agency goes first.

A conditional approval is one that cannot be used unless and until all necessary permits have been obtained; that is, it is an approval conditioned upon the receipt of all other approvals necessary for the project to proceed.

The key to understanding and using conditional approvals is identifying when they can and cannot be used. Their use varies depending on the type of land use application and whether the application is made under the affordable housing land use appeals statute, Connecticut General Statutes § 8-30g.

The *CMB* case illustrates the issue. *CMB* arose from the Planning and Zoning Commission’s denial of applications for site plan

approval for an affordable housing development under § 8-30g. Although *CMB* did not submit a formal sewer permit application, the planning commission referred *CMB*’s application to the town’s Water Pollution Control Authority (WPCA) for review and recommendation. The authority held hearings and issued “negative referrals” for *CMB*’s applications. The planning commission then denied the site plan applications because of the negative referrals from the WPCA.

The Superior Court sustained *CMB*’s appeal and remanded the application to the planning commission to approve the site plan subject to the condition that “*CMB* apply to the WPCA and obtain approval for adequate sewerage to service the property.” On appeal to the Appellate Court, the planning commission argued that the trial court improperly ordered it to approve *CMB*’s application, conditional upon WPCA approval. The planning commission claimed that the conditional approval was improper because the evidence did not demonstrate that it was “reasonably probable” that *CMB* would obtain sewer approval. The Appellate Court affirmed the trial court decision.

Permanent And Independent

Though speaking in the context of an affordable housing case, the Appellate Court’s decision in *CMB* summarizes Connecticut land use law generally regarding conditional approvals, and explains the critical distinction between unconditional and conditional approvals. The essential difference is whether

the action taken by the land use agency is permanent and independent of other approvals, or dependent on the action of other agencies.

Zone changes, for example, cannot be conditionally approved.

Once a zone is changed, the action is permanent and independent of approvals of a particular development plan.

By comparison, with regard to special permits, special exceptions, site plans, wetlands permits and sewer permits, conditional approvals are generally allowed, even without evidence of probability (reasonable or otherwise) that the coordinate agency will act favorably on the future request; this is because if coordinate permits are not obtained, the project will not proceed and consequently there is no risk of harm to the public interest. Upon denial of a coordinate permit, the conditional approval becomes moot. Thus, *CMB* clarifies the use of conditional approvals in land use matters.

CMB also clarifies that in affordable housing cases, where an application may be denied only on health or safety grounds, so long as the coordinate agency has not finally denied a formal application, the local Commission is required to grant conditional approval regardless of the probability of the granting of the coordinate approval, so long as the evidence shows that conditions can be imposed to protect public health and



Beth Bryan Critton

Beth Bryan Critton is an associate with Shipman & Goodwin LLP, where she practices land use, environmental and municipal law. Beth represents developers (including for-profit and non-profit developers of supportive and workforce housing), municipalities, property owners, condominium associations and neighbors of proposed developments. She can be reached at bcritton@goodwin.com.

safety, and where the applicant is willing to satisfy the conditions. *CMB* is less clear with regard to conditional approvals for § 8-30g zone change applications, but appears to say that such approvals are permitted but not required. Conditional approvals seem never to be required or permitted

in connection with subdivision applications, regardless of whether application is made under § 8-30g or not; the rationale is apparently the more restricted time frames applicable to subdivisions.

Conditional permits are a valuable tool to break land use log jams. Their use is par-

ticularly consistent with the objectives of the affordable housing act, where agencies are expected to cooperate to avoid unnecessary obstacles to affordable housing and where the statute requires reviewing courts to step in to impose reasonable conditions to facilitate such housing. ■