

Keeping Conditions of Approval on the Books

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In making any development application a developer is prepared to offer the Board and thus the community---improvements to their proposal. It is essential that the Board keep track of those promises and convert them into conditions of approval. Applicants are unquestionably bound by those conditions of approval; but their successors in title may not be.

The courts have found that the buyers of real estate do not have an obligation to search municipal records. Mintz v. Twp. of Millstone, 374 N.J. Super. 396, 406 (App. Div. 2005). In Mintz, the Court found that in order to bind the next generation of owners, Boards would be wise to record something in the chain of title. Id., at 407. Normally Boards will impose a deed restriction to put future owners on notice, but sometimes applicants are willing to record the entire resolution. This author suggests that recording the entire resolution may well be the best solution for all involved, and that in an ideal future world all resolutions of approval will be recorded, thereby eliminating the need for deed restrictions.

Conditions come in all varieties. Sometimes they are as simple as planting trees on a street or replacing sidewalk. Other times, they are quite complicated and may require limiting the hours of operation, requiring that a green roof be preserved for the life of building or restricting the home from being used as a mother/daughter house.

Occasionally we learn that a condition and or a deed restriction goes too far. For instance, in Tirpak v. Borough of Point Pleasant Beach Zoning Board, the Appellate Division told us that we can't in any way restrict rentals. 457 N.J. Super. 441, 443 (App. Div. 2019). In that case, the Board was not trying to limit rentals *per se*, but thought they had created a remedy for the encroachment of two-family homes in a single-family zone. Id. At 445. The Appellate Division was crystal clear that if the Board wanted to protect the single-family zone, it should have denied the applicants request. *Ibid.* So be warned. Boards generally hate to deny reasonable requests, but sometimes they have to in order to protect the zone. Sometimes the right thing to do is to say no.

We also learned recently that removing deed restrictions cannot be done by the Board or the Council. In American Dream, the court explained that the removal of such a restriction is an action that must be done only by the courts because of the public interest at stake. Am. Dream at Marlboro, L.L.C. v. Planning Bd. of Twp. of Marlboro, 209 N.J. 161, 170 (2012).

Some land use practitioners are of the opinion that as a result of the holding in American Dream developers should record resolutions instead of deed restrictions as they believe a Board could modify the recorded resolution without court authorization. While this issue has yet to be tested, recording the resolution does put everyone on notice which sounds like a positive from the Board's perspective.