Coates' Canons Blog: Amending an Approved Project

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A developer proposes a multi-phased residential development. The developer secures a rezoning from low-density residential to a higher-density residential zoning district in order to build the project. A site plan for the development is approved. The project is very successful, with sales exceeding the developer's expectations. Since the original plan of development had more open space set aside in the project than the town required, the developer decides to add an additional phase of the project to use some of the excess open space for additional housing. The developer submits a modified site plan to the town to add this additional housing. The modified site plan has less open space than the originally approved plan, but includes an amount that still meets the town's minimum open space requirements. Some of the purchasers of property in the developed portion of the project and some neighbors object, contending they have a right to rely on the original plan approval. The developer contends that since the new plan meets all of the town's current standards, the town must approve it. Must the town approve the modification request?

As a general rule, the answer is no. The developer is certainly entitled to ask for a modification of the terms of approval. But the town is not required to approve the modification of a substantially completed project. In fact, the town may not even be required to process the modification application.

The courts in North Carolina have addressed this situation twice. In both instances, the court ruled that when an applicant has received a development approval and benefited from it, purchasers, neighbors, and the government can rely on and enforce the terms of the original approval. A developer who voluntarily proceeds under an ordinance and claims its benefits must also accept the obligations and burdens included with the project approval.

The first case reaching this conclusion was *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990). In 1980 the developer secured subdivision and zoning approval for a 144-unit townhouse project on a nearly 20-acre site. Within the site was a three-acre area designated as common open space. The project was divided into seven phases, with final plats being filed immediately prior to sales in each phase. When all seven phases were built out more quickly than anticipated, the developer in 1985 submitted a project amendment to add 24 townhouses in a portion of the three acre area previously reserved for open space. Even with these proposed additional townhouses, the overall project still met the city's minimum open space requirements and density limits. The city council, however, refused to process the modification request and ordered the developer to comply with the original terms of approval (which required conveyance of the three-acre open space area to the homeowners association for open space preservation). The court ruled that preliminary approval had given the developers substantial rights, including the right to construct improvements and the vested right to complete the project once substantial expenditures had been made in good faith reliance on the approval. However, once the developers exercised those rights and substantially completed the project, the developer was bound by the terms of the approved plan of development even if that plan exceeded the minimum requirements of the city. The developer could not revert to the minimum standards unless a plan amendment was approved by the city. Further, the city had no obligation to even process the application given that the project as originally approved was substantially complete.

A recent case, *Wake Forest Golf & Country Club, Inc. v. Town of Wake Forest*, ___ N.C. App. ___, 711 S.E.2d 816 (2011), presents an even more stark take on this rule. The plaintiff developer owned and operated a golf course on a 166-acre tract. The zoning for the tract allowed one home per acre. In 1998 the owners contracted to sell a 16 acre portion of the tract to a developer contingent upon approval of a planned unit development (PUD) with 30 townhomes, six single-family homes, and a commercial area. In order to secure approval for the higher proposed density and to meet the mandated 25 percent open space requirement for PUDs, the owners elected to designate the entire 149 acre golf course as open space in their 1999 special use permit application for PUD approval. The permit was approved with the express condition that the entire property was subject to the permit and its conditions. The townhouses were subsequently built,

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but the commercial area was not.

Some years later the golf course experienced financial difficulties and closed. In 2007 the owner proposed converting the golf course to residential development and entered a contract for sale contingent upon approval of a development plan. The owner applied for a modification to their 1999 special use permit to remove that portion of the property not required to meet the density, open space, and other requirements of the ordinance related to the development in the PUD (deleting approximately 120 of the 166 acres from the permit's coverage). The town board elected not to hear or consider the proposal to amend the special use permit.

The court of appeals upheld the town's refusal to consider and act upon the application to modify the prior approval. The owner had voluntarily designated the entire golf course as open space even though that substantially exceeded the ordinance's minimum open space requirements. Following the rule established in *River Birch Associates*, the court held a city may refuse to consider a proposal to modify an approved permit when the permittee has taken advantage of the benefits secured by voluntarily depicting an area as open space in its plans. Based on the original approval, the owner secured higher densities for its PUD. After building at these higher densities, the court ruled the owner could not legally attack a condition it proposed and the town accepted.

So what is the lesson of these cases? A key take-away is that developers need to be careful about what they ask for. If they submit an application that not only meets city or county regulatory requirements but exceeds those standards, they may be held to those higher standards. Once the developer acts on the approval of their project and substantially completes the work, the local government can hold the developer to their original proposal. In fact, at that point the local government is not even required to consider a proposed modification.

Beyond the holding of these cases, what else can we say about proposed modifications of prior development approvals? A few additional propositions are fairly straightforward. Prior to starting or substantially completing a project, a permittee can certainly propose a modification. The local government should use the same decision-making process for a substantial modification as was required for the initial approval. The standards in effect at the time of the proposed modification should be used in reviewing the request. If an approval has expired, a new application rather than a modification request is required. The ordinance may treat minor modifications to an approved project differently than substantial project amendments (such as providing for expedited review), but it is helpful for the ordinance to explicitly and carefully define the boundary between the two. Presumably an amendment to a project that would lead to less impacts (say a proposal to increase the open space or reduce the amount of permitted development) could be permitted at a time when an amendment that increases impacts would not be allowed (though again ordinance provisions to define these would be useful).

Other issues related to approval modifications are less certain. For example, what if the city council in the *River Birch* situation wanted to approve the proposed modification rather than refusing to consider it? Assuming the city followed the appropriate process and the amendment was consistent with current city standards, it would seem the council would have that option. However, the purchasers of the property within the project clearly have independent rights that would be protected should they bring a legal action. What is uncertain is whether the city would have an obligation to protect the rights of those purchasers when it considers the proposed amendment when those rights exceed the minimum requirements of the ordinance. The city itself may not be required to address those independent considerations, but only further litigation would resolve that question.

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