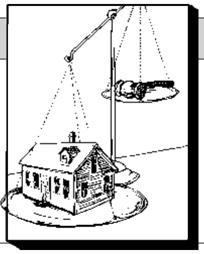

Joint Development Agreements Revisited

by Michael C. Loulakis and Jeffrey G. Gilmore

In the January issue, this column focused on concerns related to development agreements with local governments. Many of the issues discussed in that column also apply to agreements with private entities, as illustrated by a recent case in Massachusetts.

The case involved a dispute between the Charles River Construction Co. (the contractor) and a partnership known as Kirksey Associates (the owner and developer of a new subdivision) over the failure of Kirksey to complete subdivision roads, obtain permits and cooperate in joint marketing efforts.

The development, Shefford Village, was a subdivision of 47 single-family homes in Marlborough, Mass. The contract signed by the two parties—an informal "binding letter of intent" —provided that Charles River would purchase designated lots in the subdivision at specific times and serve as the exclusive contractor for the construction of the single-family homes.

Kirksey Associates, meanwhile, was to market the houses and lots as packages; to provide water and sewer connections, finished and approved roadways and sidewalks; and to obtain necessary approvals and permits for the project. In return, Kirksey Associates was to get 22 percent of the package price for each lot.

The dispute arose when Kirksey Associates failed to complete the roads and sidewalks in the agreed-upon time or to market the project after Charles River had completed two houses (at which point Charles River ceased construction). Instead, Kirksey Associates made repeated efforts to persuade Charles River to relinquish its rights under the contract so that Kirksey Associates could sell the property to Manner Built Homes, Inc.

Despite Charles River's insistence that Kirksey Associates carry out its obligations under the contract, Kirksey Associates sold some lots to Hanner Built through a real-estate broker.

Upon learning of the sale, Charles River brought suit against Kirksey Associates for breach of contract, and against Hanner Built and the broker for improper interference with its contract with Kirksey Associates. The contractor sought lost profits and punitive damages.

Following an extensive trial, the jury ruled in Charles River's favor and awarded the firm more than $200,000 in lost profits. In addition, it awarded Charles River $100,000 against Hanner Built and the broker for "interference with advantageous contractual relations."

The Appeals Court of Massachusetts upheld the lower court's ruling. Despite Charles River's failure to complete all of *its* obligations under the contract, the court held that "a promisee is not required to perform until the conditions necessary to his performance have been satisfied."

The ultimate question encountered by both the trial and appellate courts was what constitutes material breach of a joint development agreement. Charles River contended that Kirksey Associates's sale of the lots to a third party alone was a material breach. On the other hand, Kirksey Associates maintained that by failing to build any houses on the remaining lots, Charles River did not meet its own obligations under the contract—and thereby excused Kirksey Associates from performing *its* part of the bargain.

The appeals court noted that Charles River was willing and able to sell and build on many lots, but that it was prevented from doing so by Kirksey Associates's failure to obtain permits and resolve drainage problems. However, Kirksey Associates responded that Charles River's failure to obtain financing for the project relieved Kirksey Associates of its obligations.

Implications

Among other things, the case demonstrates the potential liability of those who interfere in contracts between other parties. Here, the real-estate broker and Hanner Built participated in the resale even though they knew of Kirksey Associates's obligation to Charles River. (Hanner Built had the foresight to obtain an indemnity agreement from Kirksey Associates for any liability arising out of Charles River's lawsuit, however.)

Much of the difficulty encountered in this dispute can be attributed to the informal nature of the agreement between the owner and the contractor.

Despite their participation in a transaction involving millions of dollars, the parties merely set forth their obligations in a letter of intent together with certain *oral* modifications. ■

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