

The Legal Column

by Michael C. Loulakis
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The Perils of Local-Government Contracts

Local government agencies and officials play a crucial role in the success or failure of virtually every development project.

Whether the project involves office, warehouse or retail development, local approval must be obtained on such matters as zoning, plan review, utilities, and street and parking improvements. In addition, government officials at all levels often are called upon to provide financial assistance—grants, low-interest loans or the construction of public improvements—to developers.

Close cooperation between local authorities and the developer, therefore, is crucial to the success of the project. And depending on the specific nature of the project and the size and sophistication of the local government, developers may work with many different departments and individuals.

It is therefore crucial that the developer be sure that the government representatives with whom he or she is negotiating have the authority to make decisions about the project. In addition, the authority of the local government entity itself to approve spending and contracts must be established by state law or local regulation.

In a recent case involving the City of Pittsfield, Mass., *Ungerer vs. Smith*, 765 F.2d 264 (First Cir. 1985), the U.S. Court of Appeals reviewed a development agreement, allegedly entered by a mayor with a developer, for improvements and additions to streets adjacent to a proposed shopping mall. When the agreement was rejected by a newly elected mayor, the developer sued the city for breach of contract. At issue was whether the alleged agreement with the first mayor was valid and enforceable. After a six day trial, the trial court directed a verdict for the city, based on a Massachusetts statute requiring municipal contracts in excess of \$2,000 to be in writing and signed by the mayor.

Although the Courts of Appeals rejected the

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legal theories of the lower court, it nevertheless affirmed the lower court's decision. Unlike the trial court, the appellate court found that the statute requiring such contracts to be in writing was not intended to limit the mayor's power, but to restrict contracts made by a department, board or commission, without the mayor's written approval. Instead the court relied upon the fact that although the mayor has broad powers to contract on the behalf of the city, street improvements were specifically excepted under the city charter. The charter clearly vested *exclusive* authority for street construction with the city council.

On this basis, the court of appeals held that "the broadest possible general powers in a mayor to contract cannot override a specific statutory assignment of authority to another department."

The developer's argument that the city council had implicitly approved the project through various resolutions it had passed relating to the project was also rejected by the appeals court.

Over a 16-month period during the planning stage of the project, the council had in fact appropriated the city's share of the cost, authorized applications for grant funding, and approved the general design, character, location, dimensions and siting of the mall. However, the court held that none of these resolutions resulted in a formal adoption of a contract to provide the improvements demanded by the developer.

The facts of the Ungerer case suggest that the developer may have been reasonable in assum-

ing that the council *had* provisionally agreed to the project. The matter was consistently given a "vote of confidence" with respect to various planning and funding issues that came before the council over the 16 months.

While pursuing the project in good faith, the developer apparently had been lulled into

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believing that a firm agreement had been reached. Had the developer been dealing with a private entity, these facts may have provided grounds for recovery on a theory of implied contract.

In this case, however, the developer's understanding with the mayor, and the positive steps taken by the city council, were not enough. Actions taken by municipalities and other local government entities must be consistent with relevant laws, charters and ordinances. When specific procedures or requirements are mandated by law, local authorities cannot enter binding, enforceable contracts unless their actions are in full compliance with the law.

Such requirements support the public's concern for the sound administration of local government, as they are designed to prevent unauthorized agreements and waste of public resources.

As in the Ungerer case, these requirements can create a trap for the unwary. When negotiating development agreements, the contracting party should have the government agency as well as an independent attorney review and confirm the legal prerequisites.

No matter how firm the government representative's commitment, any agreement will be unenforceable if the government entity lacks the proper legal authority to act. •

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