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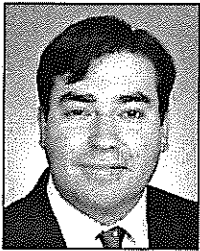
ESTABLISHED 1872

Mass. Court Grants Developers Anti-SLAPP Protection Coverage

By Daniel P. Dain

A little noticed Massachusetts Superior Court decision in December may have broad implications for developers of real estate.

In dismissing a lawsuit filed by members of the community against a real estate developer



in *Pierce vs. Mulhern*, the Superior Court recognized, apparently for the first time in Massachusetts, that real estate developers are afforded the protections of the Massachusetts anti-SLAPP statute. As the

realities of real estate development in the commonwealth mandate active public engagement by developers, through hearings with governmental agencies or meetings with community groups, the decision in *Pierce* largely shields such activity from direct legal action.

"SLAPP" is an acronym for "strategic litigation against public participation." The law is meant to protect those who participate in a public process from retaliatory litigation, typically alleging causes of action such as defamation or tortious interference with contractual relations or prospective business opportunity, which itself may be meritless, but the defense against which may be very costly.

The anti-SLAPP law has historically been the domain of those petitioning against, not proponents of, development. Indeed, the Supreme Judicial Court, in the leading case interpreting the anti-SLAPP statute, wrote, "The typical mischief that the legislature intended to remedy was lawsuits directed at

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individual citizens of modest means for speaking publicly against development projects."

Reversal of Fortune

The Supreme Judicial Court identified a single case as the impetus for the introduction of the anti-SLAPP legislation in 1994 in Massachusetts. In that case, a developer sued 15 citizens of Rehoboth who, ostensibly concerned with the protection of wetlands, had signed a petition against a permit for the construction of six single-family residences. The suit was eventually dismissed, but not before the 15 citizens had incurred thousands of dollars in legal fees defending against the action.

The anti-SLAPP law works this way: The target of a SLAPP suit files a "special motion to dismiss." The target of the suit must show that the claims are solely "based on" the exercise of the "right of petition under the constitution of the United States or of the commonwealth." The statute defines "petitioning activity" broadly to include just about any public statement concerning an issue pending before a governmental body. If the initial showing is made, then the burden shifts to the party who brought the suit to establish: that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law"; and that the petitioning activity caused actual injury to the party who brought the lawsuit.

This burden shifting imposes a high hurdle: to prove, without the benefit of discovery, the total lack of merit of the petitioning activity. Failure to meet this burden subjects the party who brought the lawsuit to paying the target's legal fees and costs.

In the recent Superior Court case, *Pierce*, members of the community appealed a special permit issued by the Winchester Zoning Board of Appeals to the developer of a proposed assisted living facility. The Superior Court vacated the special permit on procedural grounds and remanded the matter back to the Zoning Board of Appeals. The developer, however, rather than returning to the board to try

to secure another special permit that the members of the community likely would just appeal again, asked the board to sponsor Warrant Articles for Town Meeting to amend the town's by-laws in such a way that a special permit would not be necessary to proceed with the proposed facility. The members of the community filed a contempt complaint against the developer, its principals and attorney, the board and the town, alleging that the failure to return to the board for a new special permit violated the remand order.

The developer filed a special motion to dismiss under the anti-SLAPP statute arguing that the contempt complaint was based solely on the petitioning activity to the Town Meeting. The members of the community filed an opposition brief arguing that the developer was trying to turn the anti-SLAPP statute on its head, that the intention of the statute was to "protect the rights of individual members of the public," not big developers.

State Rules

The Superior Court disagreed with this concern, finding nothing in the statute to limit its protections only to private citizens. The court found that the developer had made its initial showing that the contempt complaint was based solely on the petitioning activity. With the burden then shifted to the members of the community, the court found that they had not established the lack of a factual or legal basis for the petitioning activity. The court observed that, "As a result of what [the developer] perceived as ambiguities in the Town's zoning bylaws, the [developer] sought to clarify or change those bylaws through proposed Warrant Articles that would accommodate the Project." The Superior Court dismissed the lawsuit.

To get projects built in the commonwealth, developers are compelled to participate in a variety of public forums. The Superior Court's decision in *Pierce* protects developers from direct attacks against that public participation. ■