

## Exercise of property right, or zoning by another name?

*Denial of 40B project in Newton before SJC*

By: Kris Olson ◎ April 20, 2017



The 135 Wells Avenue proposal in Newton includes 334 rental units, a portion of which would be set aside as affordable housing.

acquired property interest, which Chapter 40B cannot touch.

Local land use attorneys believe the developers may have an uphill battle getting the SJC to see things differently, though there is just enough that is unique about the case, *135 Wells Avenue LLC v. Housing Appeals Committee, et al.*, to give them pause.

Moreover, opinions vary greatly as to the impact of the SJC's decision, no matter which way it goes.

### 'Groton' is key

What has carried the day for the city so far has been the SJC's 2008 decision in *Zoning Board of Appeals of Groton v. Housing Appeals Committee*.

In *Groton*, the SJC overturned the HAC's decision to order a town to convey an easement on its property to the developer of an affordable housing project. With the easement, the developer in *Groton* would have been able to regrade and clear vegetation from a 10-foot-by-90-foot portion of the town's property, thereby eliminating a traffic hazard.

A Superior Court judge found that the easement involved only "a minimal giving up of a property right," but the SJC essentially said there is no such thing.

While under Chapter 40B the HAC has "the same power to issue permits or approvals as any local board or official," the court concluded that an order directing the conveyance of an easement was something entirely different than usurping a local board's power to grant "permits or approvals."

The question to be answered in *135 Wells Avenue* is whether anything changes if, rather than an affirmative easement, what is at issue is a restrictive covenant, otherwise known as a "negative easement."

And the petitioners contend it is not just any restrictive covenant, but one the city has managed using a process indistinguishable from the one it uses to exercise land use control in the zoning context.

### Predictions, potential impact

Land use attorneys following the case believe the *Groton* precedent will be hard for the SJC to ignore.

If it walks like a duck, then it must be a duck.

That, in a nutshell, was the argument recently made to the Supreme Judicial Court on behalf of developers who hope to gain the benefits of the state's anti-snob zoning law, Chapter 40B, to bring needed units of affordable housing to the city of Newton.

What has thwarted the developers thus far have been consistent determinations — by a Land Court judge, the Housing Appeals Committee and city officials — that what has actually ground the project to a halt is Newton's legitimately

Northampton attorney Michael Pill said he thinks the brief filed by the Housing Appeals Committee "accurately presents the law as it is, with the fundamental distinction between public land use regulation and constitutionally protected private property rights," which 40B cannot reach.

Concord attorney Paul J. Haverty agreed.

"I understand it's a little bit of a different animal," he said, noting that Newton has approved a number of what it calls "amendments" to the covenant it holds, which have not required anything beyond a waiver from the City Council. "But at the end of the day, the HAC exercised prudence, and I think that decision is probably correct."

While the SJC's decision will make or break the 135 Wells Avenue project, Haverty suspects the decision will not necessarily have far-reaching effects.

Unlike a hastily hatched plot to use an eminent domain taking to thwart a 40B project, a municipality holding a restrictive covenant that pre-dates the affordable housing law, as is the case here, "is not something you run into very frequently," he said.

But 135 Wells Avenue's attorney, Daniel Dain, said that "accepting what Newton has done here would give municipalities a blueprint for how to do an end run around 40B state oversight."

And it would be simple, the Boston lawyer added.

"The municipality could simply make adoption of a no-multi-family housing covenant a condition of all other land use entitlements, such as subdivision approval, there ever after removing such land from the reach of our affordable housing statute," he said.

The HAC, in defending itself in the appeal, has suggested that such actions could be evaluated against a "good faith" standard. But that is unrealistic, according to Dain.

"Municipalities would not come out and say they are against affordable housing; they'd say they are worried about traffic and compatible uses," he said. "But those are land use decisions. When municipalities are below their affordable housing threshold, we require state oversight of those decisions."

The Citizens' Housing and Planning Association agrees that an adverse ruling by the SJC poses a threat to Chapter 40B, which it has championed since it was first adopted a half-century ago.

While certainly not alone in its resistance, Newton "puts a lot of obstacles" in front of development under Chapter 40B, said Jeffrey Sacks, part of a Nixon Peabody team that has worked with CHAPA on several amicus briefs, including the current one.

Sacks' colleague, Christopher R. Minue, said the HAC should continue to examine whether a community has acted in good faith when using eminent domain or other tools that effectively block a 40B project. But beyond that, "a town should not be able to treat a covenant like zoning," he said.

At the end of the day, what this case is about is that private property rights, while important, "are not sacrosanct," Dain said.

Just as with building and health codes, environmental regulation and nuisance laws, zoning regulates what private owners can do with their property. And, by passing Chapter 40B, the Legislature has decided the state should have oversight of land use decisions in cities and towns with inadequate affordable housing.

"Where Newton is below the 10 percent affordable housing Chapter 40B threshold, Newton should not be allowed to say 'yes' to offices, medical facilities, day care centers, private schools and athletic clubs, but 'no' to affordable housing, without state oversight," Dain said.

Newton City Solicitor Donnalyn B. Lynch Kahn declined to comment for this story.

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— Daniel Dain, Boston



## 'Light industrial' plans abandoned

Back in 1960, Sylvania Electric Products asked Newton to change the zoning — from residential to "limited manufacturing" — of 153.6 acres surrounding what is now Wells Avenue. Sylvania's vision was to develop the area as a "large, single-user industrial/manufacturing site."

Concerned that the requested re-zoning would be challenged as illegal "spot zoning," the city came up with a backup plan. Sylvania would give the city an option to purchase a strip of land on the site, which would give the city a dominant estate capable of enforcing a restrictive covenant on Sylvania's remaining land.

In 1967, Sylvania abandoned its plans and sold the land to a realty trust, which subdivided the land.

The city exercised its option in May 1969, purchasing 30.5 acres from the trust under a deed extending the 1960 option's restrictions for 99 years.

The city's covenant on the privately owned parcels — including the one 135 Wells Avenue LLC hopes to develop — limits the total floor area of Wells Avenue buildings, establishes setbacks, limits building heights, creates a buffer zone, and restricts signage and lighting.

In other words, 135 Wells Avenue LLC contends, the covenant functions just as the city's zoning ordinance does in designated "light manufacturing" districts.

The covenant makes no mention of the holder being able to grant "amendments" to allow nonconforming uses. But just two years later, the Board of Aldermen, on an ad hoc basis, began using a process that, from start to finish, "mirrors" what the zoning ordinance requires for special permits, according to the petitioners.

The end result is that the area not only has become home to a number of businesses inconsistent with Sylvania's original vision but would now make "light manufacturing" incompatible on the site, the petitioners claim. Those businesses include a tennis and fitness club, a gymnastics academy, a mathematics school, a day care center and a "bouncy house."

In May 2014, 135 Wells Avenue LLC tried to walk through the door the Board of Aldermen had opened, applying to the Newton Zoning Board of Appeals for a comprehensive permit under Chapter 40B to build a 334-rental-unit complex, a portion of which would be set aside as affordable housing. Simultaneously, it sought an amendment from the Board of Aldermen.

While the process before the ZBA was ongoing, the Board of Aldermen denied 135 Wells Avenue's amendment application. During the ZBA hearings, Newton's law department opined that amendments were either "conveyances" of city real estate or "transfers" of city real property, but outside of the scope of Chapter 40B in any event.

In December 2014, based in part on the law department's advice, the ZBA voted that it did not have the authority to approve an amendment as part of the comprehensive permit process and also voted to deny 135 Wells Avenue's 40B application.

The developer appealed to the HAC, which in December 2015 ruled against it, citing the *Groton* decision. On Aug. 16, 2016, Land Court Judge Robert B. Foster reached a similar conclusion.

The SJC subsequently took the case on direct review.

## Negative easement no different?



To the city and the HAC, the fact that the property right in *Groton* was an affirmative easement and the one in *135 Wells Avenue* is a negative one is of no legal significance. They point out that the SJC itself, in rejecting a challenge to the deed restriction as "spot zoning" in 1962, established that the city held a property interest "validly imposed by a sealed and recorded instrument." Under *Groton*, that essentially ends the inquiry, they contend.

But attorneys for developer 135 Wells Avenue LLC counter that their case actually passes the three-part test the SJC established in *Groton*.

*Groton*, they argue, first says that "permits and approvals," as defined in Chapter 40B, need to be the kind "typically given" by local boards or commissions. Given that the Newton aldermen have used a special-permit-like process 19 times to grant amendments, that criteria is met, the petitioners contend.

*Groton* also specifies that Chapter 40B can only reach permits and approvals dealing with "typical land use controls," such as "height, site plan, size or shape, or building materials." Those are exactly the types of considerations the Newton Board of Aldermen have been weighing and embodying in the conditions they have attached to their amendments, 135 Wells Avenue says.

Finally, the *Groton* decision says that a permit or approval granted through Chapter 40B "cannot usurp an area effectively preempted by another state law," in Groton's case, Chapter 40, §§3, 15A, regulating the conveyance of municipal land.

Given that the "restrictive covenant remains in place with continued vitality" and that there would be no deprivation of public enjoyment of land, its case is different, 135 Wells Avenue contends.

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