A new landscape for builders

By Paul McMorrow

March 25, 2011

THE DECISION from the Supreme Judicial Court was short, and it arrived with little fanfare two weeks ago. It resolved a long-running dispute over views from a Chatham porch. But this little case has the potential to reshape the landscape for builders and developers in Massachusetts.

In theory, cities and towns in Massachusetts have a standard process for getting things built. Developers file plans, which are aired at the neighborhood level and vetted by local planning boards or redevelopment commissions. Most building projects involve some degree of negotiation and horse-trading between the developer and the permitting body. This is especially pronounced in and around Boston, although the assumption that developers have to barter their way to permits permeates much of the state.

This process should be the end of the line. Builders should be able to take their permits and put them to work, but they often can't. NIMBY opposition to development of all sizes has become so ingrained in the region that project opponents have taken to treating adverse zoning board decisions as the price of admission to a prolonged court campaign, instead of the final say-so. Ardent development foes can endanger building projects simply by prolonging litigation and drowning developers in legal bills. The Chatham case the SJC just ruled on is significant because it re-empowers local zoning boards. The SJC did this by freeing up the state Land Court, which hears challenges to zoning rulings, to quickly toss nuisance cases out of court. The SJC also erected a high barrier against second-guessing the clearing of nuisance cases. Most importantly, it reiterated that Massachusetts residents can't simply challenge development permits because they're angry at their town zoning board; they actually have to be harmed by a zoning decision.

The lawsuit stemmed from a minor zoning conflict. A Chatham couple got permits to raze their oceanfront cottage and rebuild it above the floodplain, on the same footprint, seven feet higher than it had originally stood. The couple across the street sued, claiming, among other things, that the new house would block their views of the Atlantic.

In court, the couple rebuilding their house argued that the Chatham zoning board hadn't railroaded their neighbors just because they'd approved a building that would alter their neighbors' views in some small way. The Land Court agreed, ruling the neighbors lacked any standing to challenge the zoning decision. That decision was reversed on appeal. The SJC sided with the Land Court, and then it went a step further. The SJC said that, barring some catastrophic mistake, state appeals courts have no business second-guessing decisions that Land Court judges make when deciding whether or not plaintiffs have standing to bring a suit into court. This frees up the Land Court to manage its heavy case load much more aggressively.

The issue is important in real estate. It's often the difference between a nuisance lawsuit and a legitimate one. The Legislature never intended to allow anybody who disagrees with a local zoning decision to use the courts as a super-zoning body. Potential plaintiffs aren't just project opponents who perceive themselves to be impacted by a new office building or strip mall or waterfront cottage; to get in the courthouse door, plaintiffs have to be genuinely injured. "To conclude otherwise,'' the SJC ruled, "would choke the courts with litigation over myriad zoning board decisions where individual plaintiffs have not been, objectively speaking, truly and measurably harmed.''

Daniel Dain, who represented the Chatham zoning board before the SJC, says judges can generally resolve standing disputes in months, rather than the years it takes for cases to be adjudicated. For most developers, that's the difference between a project that can survive a baseless challenge, and one that buckles.

Paul McMorrow is an associate editor at CommonWealth magazine. His column appears regularly in the Globe.