In zoning case, attorney hopes to fend off ‘chilling effect’ of $400K fee request

By: Kris Olson June 17, 2022

The entrance to Eastleigh Farm in Framingham

When he appears by videoconference in Land Court on June 28 to oppose a developer’s motion for attorneys’ fees and costs, Robert G. Cohen will be fighting to prevent the “financial ruin” of his Framingham neighbors. But he also hopes to preclude the “chilling effect” such an award would have on abutters wishing to challenge local zoning decisions in the future.

To the developer, it is precisely the type of case in which an award of attorneys’ fees is warranted, given that substantially all the plaintiffs’ claims were “wholly insubstantial, frivolous and not advanced in good faith.”

As he explained in a recent letter to Lawyers Weekly, Cohen became involved in the fight over a proposed marijuana cultivation and manufacturing facility at Eastleigh Farm two and a half years ago on a “semi pro bono basis.” He is now “fully pro bono” in helping his clients combat a motion brought under G.L.c. 231, §6F, seeking nearly $400,000.

The 112-acre farm sits in a district that the Framingham Zoning Bylaw classifies as “residential-rural.” In such a district, a facility like the 100,000-square-foot facility that Commonwealth Farm 1761 has proposed to build is an allowed use, subject to site plan review.

Soon after the Framingham Planning Board approved Commonwealth Farm's site plan in August 2019, a single abutter filed suit in Middlesex Superior Court. Once that abutter retained Cohen, the case was transferred to Land Court.
Cohen added six additional abutters as plaintiffs and the city as a defendant, as a precursor to adding a claim seeking to invalidate the amendment to the city's zoning bylaw that opened the door to Commonwealth Farm's project as impermissible "spot zoning."

Commonwealth Farm now says the plaintiffs were aware from the beginning that their spot zoning claim lacked merit, because Cohen said so in open court.

At a Feb. 12, 2021, scheduling conference, Cohen apparently acknowledged that the spot zoning claim was "dubious at best," given that there were three or four other lots within the district where the project could have been sited, according to a transcript included in Commonwealth Farm's motion.

Given that grim assessment, Judge Michael D. Vhay asked Cohen whether his clients were prepared to drop the spot zoning claim. According to the transcript, Cohen pledged to discuss the issue with his clients, but two weeks later reported back that his clients wanted to forge ahead with the claim.

When Vhay ruled on the parties' cross motions for summary judgment on Jan. 24, he not only found that the "spot zoning challenge fails as a matter of both fact and law" but said that the plaintiffs had not brought forth "credible evidence" that they had standing to challenge the Planning Board's site plan approval.

Commonwealth Farm partially attributes the plaintiffs' failure to establish standing to their use of a single expert, who lacked the expertise to counter evidence offered by the developer's expert that the project would not adversely affect the water supply or neighborhood character, or produce odor, noise or traffic that would be particularly harmful to the plaintiffs.

The plaintiffs' expert had development experience and held real estate and construction supervisor licenses, but had no such credentials in civil engineering, sound engineering or marijuana cultivation.

At the end of the day, the plaintiffs showed themselves to be "more concerned with delaying the construction of the Facility and running up costs for opposing litigators rather than protecting any zoning rights," Commonwealth Farm argues.

But given their punitive nature, courts should reserve awards of attorneys' fees under G.L.c. 231, §6F, for "the most egregious cases," of which this is not one, Cohen counters.

"Plaintiffs' claims were unsuccessful, but that does not mean they were frivolous or made in bad faith, and therefore subject to sanctions," Cohen writes in his opposition. Cohen also argues that Commonwealth Farm's motion is time barred. Commonwealth Farm needed to file it not later than 10 days after the entry of judgment — not the 68 days that elapsed here.

In his order setting the June 28 hearing, Vhay specifically instructed the parties to come to the hearing prepared to address the contention that the motion is untimely. Neither Cohen nor the developer's attorneys — Joshua S. Grossman, Shawn M. McCormack and Courtney A. Simmons, of Boston's Davis, Malm & D'Agostine — had responded to requests for comment as of Lawyers Weekly's deadline.

But Northampton land use attorney Michael Pill agrees that Commonwealth Farm will not be able to meet the high "wholly insubstantial, frivolous, and not advanced in good faith" standard under G.L.c. 231, §6F.

"Nothing that I saw in the Land Court decision even hinted or suggested that the plaintiffs acted without at least some basis for their arguments," Pill says.

Instead, it appears that the developer has brought the motion for fees and cost "solely as an attempt at revenge to punish the plaintiffs for exercising their constitutional right to petition," the type of retaliatory claim against which the state's anti-SLAPP statute, G.L.c. 231, §59H, now further protects, Pill says.

"If this motion is allowed by the court, it will open the door to what amounts to retaliatory evasion of the anti-SLAPP act," he says.

Boston real estate attorney Daniel P. Dain agrees that the state's anti-SLAPP statute affirms the American Rule, which says that each party to litigation should pay its own way, absent an exception.

But he notes that if protection of development opponents is too robust, there is a policy downside, too.

"Some opponents have learned that simply appealing entitlements, regardless of the merits of their arguments, will lead a certain percentage of developers to walk away from their projects, unable to afford the carrying costs, loss of market timing, and expenses of protracted litigation," he says.

Dain believes it may be time to reevaluate where the proper balance lies, given how expensive development in the state has become.

That may be particularly true in a case like this one, where the plaintiffs seem to have challenged an as-of-right site plan approval, which the local Planning Board did not have the discretion to deny.

As for Cohen, Pill says that he is unfortunately getting a harsh reminder of the old maxim that "no good deed goes unpunished."

"This case should be a warning against going outside of one's professional experience and competence," Pill says, noting that spot zoning "is a tough case to make" and that standing can be a major barrier to G.L.c. 40A, §17, zoning appeals.

"These are specialized areas of the law into which the non-specialist should hesitate to venture, particularly in the Land Court where the judges are extremely well-versed in both appellate case law and Land Court decisions," Pill says.