MASSACHUSETTS LAWYERS WEEKLY

Neighbors must post $20K bond to appeal zoning variance

Housing Court judge invokes provision to prevent 'frivolous' challenges

By: Eric T. Berkman June 23, 2016

Residents opposed to a proposed development in their neighborhood could be required to post a $20,000 bond in order to challenge the variance that Boston's zoning board of appeal issued for the project, a Housing Court judge has held.

Though the Superior Court has ordered bonds be posted pursuant to Section 11 of Boston's enabling act as a pre-condition to challenging a project in the city, the case is believed to be the first in which the Housing Court has done so.

The defendant developer had purchased adjoining parcels, on which he planned to replace a smaller existing building with a 16-unit structure. The developer argued that the bond was warranted to avoid potential harm from the plaintiffs' challenge.

Judge Marylou Muirhead agreed.

Pointing to the ZBA's findings that unique topographical conditions necessitated a variance to avoid depriving the developer of reasonable use of the land, and that the ZBA granted only the minimum variance necessary to achieve that purpose, "it cannot be said that the ZBA made its decision on legally untenable grounds," Muirhead wrote.

Given the unlikelihood that the plaintiffs would be able to establish that the ZBA's decision was arbitrary and capricious, the judge continued, "the court finds that a bond in the amount of $20,000.00 is reasonable."

The seven-page decision is Goureev, et al. v. Zoning Board of Appeal, et al., Lawyers Weekly No. 17-002-16. The full text of the ruling can be ordered here.

Helpful tool

Jonathon D. Friedmann, who represented the developer, said courts do not often require a plaintiff to post a bond in order to proceed with a lawsuit. In fact, he said, Goureev was the first time he could recall the Housing Court ordering a project opponent to pay a bond in order to challenge a ZBA decision. While he said he had seen the Superior Court do so, it was typically in cases in which an aggrieved developer was appealing the denial of a variance, as opposed to a project opponent appealing the grant of one.

The Boston lawyer conceded that ordering a party to post a bond could well be a difficult call for a judge to make at such a preliminary stage.

"You're at the very beginning without full discovery," he said. "It's not like an anti-SLAPP motion where you may have briefed the case almost to the point of summary judgment. This is right up front where, if the judge doubts your claim, you've got to pay money to play."

Still, Friedmann said, the legislative purpose behind the provision was to keep people from bringing frivolous challenges to ZBA decisions. Here, the judge wrote a well-thought-out decision about all the considerations that a court needs to take into account, he said.

Donald R. Pinto Jr., meanwhile, said the ruling highlights the bond provision in Section 11 as an important tool in a

Boston real-estate developer's kit.

Though the statute caps a bond at $25,000 for projects under 50,000 square feet, Pinto said a bond of that size can be enough to deter an abutter from pursuing an appeal with the primary purpose of delaying a project and increasing a developer's costs.

"From the developer's standpoint, there's no real downside to asking the court to impose a substantial bond," said

Pinto, a real estate litigator in Boston. "Even if the motion is denied, there's strategic value in giving the court an early look at the merits of the case in the context of a motion pointing out the lack of merit and the plaintiff's possible untoward motives."

Daniel P. Dain of Boston, who also litigates land-use cases, agreed.

"Obviously, some zoning appeals have merit, but too often they are brought simply with the hope that the expense and delay from the litigation alone will change the economics of a proposed development such that the developer will abandon the project," Dain said. "An increased willingness by the courts to change that calculation so as to impose some of those costs on the opponents of new development should help reach a better balance and allow the courts to spend more of their time considering those appeals that really do have merit."

Pinto noted that developers working outside of Boston have "long wished" for a comparable provision in Chapter 40A, the state zoning act that is applicable in every other municipality.

"It's encouraging that the zoning reform bill that recently passed the Massachusetts Senate includes just such a provision, though in that bill the maximum bond is $15,000, which in most cases will be too low to have the desired deterrent effect," he said.

Proposed project

Defendant Ryan Connelly purchased adjoining parcels on Ward Street in South Boston. He planned to demolish the existing building and construct in its place a four-story building with garage parking.

In order to complete the project, however, he needed a variance due to lot size.

Boston's Zoning Board of Appeal granted the variance in December 2015, concluding that due to the physical configuration of the lot, a variance was necessary to avoid depriving Connelly reasonable use of the land.

After the variance was granted, two neighbors, plaintiffs Andrei Goureev and Csaba Toth, came forward alleging that if the project proceeded, they would suffer harm from increased density, blocked access to adequate light and air, and diminished privacy. They also claimed that the project would harm the value of their own properties.

While the plaintiffs apparently never voiced any on-the-record objections to the project while the defendant's request for a variance was pending before the ZBA, they filed suit in Housing Court seeking to have the ZBA decision overturned.

The defendant subsequently filed a motion to require the plaintiffs to post a bond pursuant to Section 11 of Boston's zoning enabling act.

The motion was served on the plaintiffs on March 16, more than three weeks before it was heard. Nonetheless, in opposing the motion, the plaintiffs, who were litigating the case pro se, did not provide the court with information as to their likelihood of success on the merits, their financial resources, or their ability to post a bond.

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>
> *— Donald R. Pinto Jr., Boston*

Reasonable necessity

In considering whether to impose a bond under Section 11, the judge said she would need to determine whether doing so would unfairly preclude review of a meritorious case while weighing the plaintiffs' resources against the potential harm to the defendant if no bond was set.

Regarding the merits, Muirhead said a ZBA decision should not be disturbed unless it was based on legally untenable grounds or was "unreasonable, whimsical, capricious or arbitrary."

Here, the judge found no grounds to believe the ZBA's decision fit any of those categories.

First, she noted that the ZBA found the proposed building would be consistent with prevailing uses of property in the neighborhood, which featured numerous multi-family dwellings, including such buildings immediately adjacent to the project site.

Muirhead also emphasized the ZBA's finding that the minimum lot size requirement was inconsistent with "as-built conditions" in the neighborhood and that the proposed structure would be "contextually appropriate" with other multi-family buildings in the immediate vicinity.

"In summation, the ZBA stated that the proposed development 'would constitute an improvement over the current use, would not be inconsistent with prevailing use and density patterns in the neighborhood, and would allow for the addition to the neighborhood of much needed new housing,'" the judge said. "By providing such detailed and thorough grounds on which it made its decision, it cannot be said that the decision by the ZBA was unreasonable, whimsical, capricious or arbitrary."

Meanwhile, Muirhead rejected the plaintiffs' contention that the ZBA's findings did not actually establish that the developer needed a variance to realize reasonable use of the land.

"[T]he plaintiffs argue … that erecting a smaller structure would not cause any substantial hardship for the defendant, and that the granting of these variances would change the character of a residential neighborhood," Muirhead stated. "However, the [plaintiffs] only offer a scantily-detailed map of the parcel to accompany the complaint and failed to submit any opposition to [the defendant's] motion to require the filing of a bond."

Because the plaintiffs failed to establish a likelihood of success on the merits or the limit of their resources, Muirhead concluded that a $20,000 bond was a reasonable condition for allowing their claim to proceed.

Goureev, et al. v. Zoning Board of Appeal, et al.

THE ISSUE: Could residents opposed to a development project in their neighborhood be required to post a $20,000 bond in order to challenge a variance issued by Boston's zoning board of appeal that would allow the project to proceed?

DECISION: Yes (Housing Court)

LAWYERS: Andrei Goureev and Csaba Toth, of Boston (pro se plaintiffs)

Jonathon D. Friedmann of Rudolph Friedmann, Boston (defense)

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