SJC Reaffirms that Chapter 40B does not Supersede Property Rights

image credit: Nick Roberts

General Laws Chapter 40B was enacted nearly 50 years ago to overcome local obstacles to affordable housing. A powerful tool against parochial requirements and regulations, it authorizes the municipal zoning board to issue a "comprehensive permit" overriding all local requirements or regulations for an affordable housing project, instead of the developer's having to obtain permits and approvals from various municipal boards and commissions. However, as the SJC recently reaffirmed in *135 Wells Avenue, LLC v. Housing Appeals Committee*, 478 Mass. 346 (2017), even Chapter 40B does not supersede property rights.

In *135 Wells Avenue*, the developer sought a comprehensive permit from the Newton Zoning Board of Appeals for a 334-unit apartment complex, with 25% of the units to be affordable. In a 1960 agreement with then-owner Sylvania Electric to rezone the parcel to limited manufacturing, the City had acquired both (1) a restrictive covenant (a negative easement) restricting the uses of the development parcel to certain limited manufacturing uses and (2) title to an adjacent parcel that was restricted to conservation, parkland and recreational uses.

Over the years, the City Council had modified the restrictive covenant on the development parcel to permit a variety of commercial uses, but it declined to modify it to allow the residential affordable housing project. The Zoning Board concluded that it had no authority to override that covenant, and both the Housing Appeals Committee (the HAC, a board within the Department of Housing and Community Development that hears Chapter 40B appeals) and the Land Court agreed. So did the SJC, rejecting several of the developer's arguments.

First, the Court held that the universe of "permits or approvals" that can be issued by a zoning board under Chapter 40B, though encompassing local regulatory restrictions beyond zoning, does not extend to modification of a restrictive covenant, a property right. It extended its previous decision in *Zoning Board of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 35 (2008) (the HAC lacked the authority to require the town to grant an affirmative easement for access), to negative easements, as well. The Court reaffirmed that affirmative and negative easements are treated equally.

Second, the SJC rejected the argument that the uses on Wells Avenue had changed so much since 1960, with no manufacturing ever conducted there, that the restrictive covenant no longer served any legitimate purpose. Under the common law of easements (irrespective of Chapter 40B), a restrictive covenant that no longer serves its intended purpose is unenforceable. The Court held that, although the 135 Wells Avenue property is no longer being used for the precise purpose for which the covenant was created, the covenant still provides valuable benefits to the City's abutting parcel and neighboring parcels and remains enforceable.

Finally, the Court addressed the developer's argument that an adverse decision could induce towns to acquire restrictive covenants in bad faith, in order to obstruct affordable housing projects. It found no evidence of bad faith in this case, particularly where the covenant was created before Chapter 40B was passed. In addition, it rejected the HAC's suggestion that a covenant could be modified if the town acted in bad faith; even the presence of bad faith would not authorize the HAC to require a town to take an action beyond its statutory authority. Instead, a town's bad faith "may form part of a claim" for judicial review of an HAC decision.

Thus, although a zoning board's authority under Chapter 40B is very broad, it does not extend to property rights and restrictions. Affordable housing developers should address any such restrictions early on, outside the Chapter 40B comprehensive permit process.

Disclosure: Art Kreiger served as a mediator in this case while the developer's appeal was pending before the HAC. The mediation was unsuccessful, at least in large part because of the view that that appeal could not address the City's restrictive covenant.