

HOUSING MATTERS

Abutter Appeal Reform Has the Potential to Reduce Costly Claims

New Law Aims to Discourage Frivolous NIMBY Lawsuits

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SPECIAL TO BANKER & TRADESMAN



Househunters in the greater Boston area right now see how painfully obvious it is that the housing supply has not kept pace with demand in our region.

Aspiring buyers jockeying for the few opportunities that do exist have stoked bidding wars and caused price jumps that were unimaginable only a few years ago. And the demand among renters continues to be intense in desirable communities.

The solution to our region's housing crisis is to increase supply: produce as much housing as possible at a variety of price points.

The business of building new housing is challenging, particularly in our region, where all of the elements needed to create housing are costly and take time and extensive process in the best of circumstances.

There are opponents to even the best of projects, regardless of their merits, motivated by "not in my backyard." In many cases, NIMBY challenges are negative reactions to change – any change – in the community or neighborhood. Over time, opponents have developed a series of tools to assist them in their effort to stop or slow development plans they don't like.

Their goal is to disrupt the development process and add costs and schedule delays to projects to cause them to fail. Unfortunately, these efforts have been effective, as tens of thousands of housing units in hundreds of developments over time that would otherwise have been built in communities across the commonwealth never happened.

Intentional Obstruction

A common NIMBY practice involves filing lawsuits against developments with no real substantial claims – "nuisance lawsuits." The goal is to string the process out so developers give up. And because the cost and consequences to the opponents of such irresponsible behavior are low, it has become a common practice.

What's so expensive about delays? Developers know well, and opponents have come to understand and exploit, the significant costs that a year or two in court can create.

Developers who can't get a shovel in the ground are delayed from having a completed development with rents coming in. Construction delays result in extra carrying costs including legal fees, interest, insurance, real estate taxes and other expenses like maintaining underutilized properties in the meantime. Delay also adds risk that more cost will make the project infeasible, quality will need to be compromised or only ultra-luxury rents will make it sustainable.

In a recent newsletter the advocacy group CHAPA, the Citizens' Housing and Planning Association, stated that Massachusetts "has accorded disproportionate power for abutters to challenge a project for the improper purpose of obstruction and delay."

Just recently something emerged to address this problem, called abutter appeals reform. This is a significant provision in the new economic development bill that Gov. Charlie Baker signed into law last month.

The section of Massachusetts zoning law regarding challenges to proposed new developments, including housing, was changed. It now allows a court to require opponents to post a bond of up to \$50,000 to cover a developer's delay costs if the opponents ultimately fail with their appeal.

By having to put up significant money to challenge a development, opponents will be deterred from bringing frivolous lawsuits – those designed primarily to hold up a developer and chew up time and money.

Important Step Forward

Under the new law, judges can require this bond for appeals to the large number of cases where a special permit, zoning variance or local site plan specifically has been issued. In those situations, because the development has already been subjected to great scrutiny through a public process, an appeal by an opponent is unlikely to win on its merits.

This bond approach is not entirely new. As an example, tucked inside an existing state law that provides financial incentives for municipalities to zone for higher density housing is a provision that allows judges to require appellants to post bonds.

What is unique about this new provision is the relatively high financial bar of up to \$50,000 that it sets, as well as how broadly it can be applied. With many of these types of appeal cases every year, this provision has the potential to be very impactful.

Importantly, the law is sensitive to the needs and resources of those objecting to a proposed project. It takes into consideration the relative merits of the appeal and the financial means of both the developer and the challenger.

Abutter appeal reform is an important step that can make a difference in the practice of producing the critical housing we need. It is a promising new tool with the potential to make a real difference and to efficiently produce more housing. ◀

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