Court Recognizes Value of Affordable Housing

The highest court in Massachusetts has ruled that a group of neighbors cannot oppose an affordable housing development based on how it may affect their property values.

A JUNE DECISION by the Supreme Judicial Court (SJC) of Massachusetts overturned an appeals court ruling that determined that six plaintiffs in the town of Andover had standing to contest a neighboring affordable housing development based on their claim that it would diminish their homes' value.

The case, *Standerwick, et al. v. Zoning Board of Appeals of Andover, et al.*, was seen as an important test to a state statute known as Chapter 40B, which was enacted to promote the development of low- and moderate-income housing in Massachusetts. The justices' unanimous finding further delineates how affordable housing projects can be contested under the statute, according to lawyers involved in the case and observers.

"It clarifies and certainly demonstrates how narrow the bases are to attack the premises under 40B," explains Kevin O'Flaherty, a Boston lawyer who represented the developer, AvalonBay Communities, Inc., based in Alexandria, Virginia. "It will eliminate some of the attacks that people have mounted under 40B, such as property values. So, in that sense it's taking some of the arrows out of the quiver of those opponents and in essence breaking them in half."

O'Flaherty says the case was closely watched in real estate circles. "A lot of people have been following the case up here, because they have cases that are going to turn on it," he notes. "Everybody was holding their breath to see which way this would go."

The dispute arose in June 2002, when Eileen Standerwick and other homeowners filed suit against the developer of a 115-unit, four-story apartment building in Andover, a town located about 25 miles (40 km) north of Boston. The plaintiffs claimed that as abutters and neighbors to the proposed development, they would be "aggrieved" by its construction, according to the court. They listed several factors, including noise, traffic, crime, a decrease in privacy, and a diminution of their property values. The case ultimately boiled down to the property values argument, as the judges declared Standerwick and her neighbors failed to offer evidence of the other impacts.

AvalonBay asked the court to grant its motion for summary judgment, arguing that the plaintiffs lacked standing to challenge the comprehensive permit based on property value alone. The judges agreed and granted the motion.

"The preservation of real estate values of property abutting an affordable housing development is clearly not a concern that the G.L. c. 40B regulatory scheme is intended to protect," the court explained.

Indeed, the court went on, allowing such an appeal would "grant standing to challenge a comprehensive permit to persons who object to the construction of any affordable housing project simply by claims that the introduction of affordable housing for low- and moderate-income persons would cause their property values to drop."

The decision upheld a superior court decision supporting AvalonBay's motion for summary judgment and overturned a judgment by the appeals court, which had held that diminution in real estate values "is an injury that is a tangible and particularized injury to a private property or legal interest protected by zoning law," according to court papers.

O'Flaherty, a director at Boston-based Goulston & Storrs who specializes in land use litigation, says the decision marked the first time the court had adjudicated precisely on the property value issue.

"There had been an assumption among practitioners and lower court judges that sure, of course [a challenge can be made on property

value grounds] . . . and in fact a lot of project abutters opposed projects because of diminished [property] value," he adds.

Andrew Caffrey, Jr., a general practice lawyer in Andover who represented the plaintiffs, says the court's ruling eliminates the possibility of an abutter taking an appeal. "It gives the zoning boards a blank check," he asserts.

But backers of the decision, such as the Greater Boston Real Estate Board, contend that the court's action would help reverse a long-time strategy whereby opponents of low- and moderate-income housing would litigate simply to draw the process out in the hope that the developer would give up.

"Because Massachusetts has such a huge problem with housing . . . it makes sense to have those cases adjudicated as quickly as possible," says Gregory Vasil, chief executive officer of the real estate board. He adds that the state legislature is working on legislation that would create a special session of the land court to deal with Chapter 40B appeals.

Chapter 40B has had its fair share of turbulence since it became law. Passed in 1969 by the Massachusetts legislature as the Comprehensive Permit and Zoning Appeals Act, the goal was to encourage cities and towns to ensure that at least 10 percent of their housing stock would be affordable for low- and moderate-income households. The process worked like this: a developer would seek a permit from the local zoning board of appeals. The permit could be approved or denied. If the permit was denied, the developer could appeal to a state-level Housing Appeals Committee, which could override the local board's decision.

In the Standerwick case, the zoning board of appeals in Andover initially rejected Avalon-Bay's request for a permit. The developer appealed to the HAC, which assembled the parties and tweaked the project. The Andover zoning board then approved the project, spurring the suit by Standerwick and the other homeowners.

The law has sparked debates throughout Massachusetts over whether the commonwealth should be able to override decisions made by municipal boards.

"In a state characterized by a long and strong tradition of local government autonomy, the law was highly controversial because it reasserted the state government's authority to have the 'final say' in local land use and zoning," according to Sharon Krefetz, a government professor at Clark University in Worcester, Massachusetts.

The SJC referenced the framework—and the continued debate around it—in its decision, saying the law "reflects the legislature's considered judgment that a crisis in housing for low- and moderate-income people demands a legislative scheme that requires the local interests of a town to yield to the regional need for the construction of low- and moderate-income housing, particularly in suburban areas."

Nearly four decades after the law was enacted, 47 communities have met the 10 percent standard, according to the Citizens' Housing and Planning Association, a nonprofit organization based in Boston that advocates for the production and preservation of affordable housing. About 43,000 units have been built since the early 1970s, the association says, a total that includes approximately 23,000 affordable residences reserved for households that make below 80 percent of area median income.

While the law has helped open suburbs to affordable housing, the statistics and Krefetz's research show that resistance to low- and moderate-income housing remains. One argument was that the residents of such housing would not contribute enough to the tax base to support town services for them. Another was the perception "that an influx of low- or moderate-income persons, especially minorities, would result in a decrease in property values and the presence of undesirable neighbors with unruly children," Krefetz's research found.

Andover reached the 10 percent threshold for affordable housing in 1994 or 1995, says Thomas Urbelis, the town's attorney. He would not comment on the Standerwick case.

Despite the developer's victory, the project remains stalled. The parties are fighting in court over whether approval has been granted for a sewer system for the planned development. The town approved the system about a decade ago, Urbelis said, but then rescinded the permit in 2004. The court will need to decide which vote should be honored. The developer has filed a motion for summary judgment in superior court, O'Flaherty says. **MFT**

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