New Housing Bill Raises Bar for Abutter Appeals

By Christopher R. Agostino on August 6, 2024

On August 6, 2024, Governor Maura Healy signed **H. 4977**, entitled the Affordable Homes Act, which builds on **recent legislation** intended to address the state's housing crisis. In addition to funding affordable housing developments throughout the state and paving the way for the creation of accessory dwelling units, this most recent legislation makes critical amendments to the Zoning Act intended to overcome an obstacle often cited as a key driver of the cost of development in Massachusetts – vexatious abutter appeals.

In January of 2021, the legislature amended Section 17 of Chapter 40A to add an abutter appeal bond requirement. The intent was to require plaintiffs to post a bond to deter appeals that have little likelihood of success or that are brought by abutters not substantially harmed by the proposed development. Developers facing an abutter appeal could petition the court to require an appeal bond of no greater than $50,000 to secure plaintiffs' payment of "costs" if it is determined that the appeal was brought in bad faith or with malice. Courts were required to review the complaint and factual allegations at an early stage and decide whether to impose an appeal bond based on the "relative merits" of the appeal. A court could later award "costs" to the defendant developer if the required finding of "bad faith" or "malice" was made at the conclusion of the case. The bond would secure payment of costs, but more importantly, it would require plaintiffs challenging the development of critically needed housing to think a bit more about whether they are truly harmed by the proposed construction before writing a large check for an appeal bond.

The 2021 amendment led to several **decisions** in which courts struggled with the scope and impact of the new law. Ultimately, the 2021 amendment did not yield the intended result as the SJC and lower courts determined that the law still required some inference of "bad faith" or "malice" as a *pre-condition* to bond issuance. The SJC's interpretation required a preliminary finding that the appeal was, "so devoid of merit that it may be reasonably inferred to have been brought in bad faith." This holding created a high burden for developers to actually win a bond motion and ultimately receive an award of costs against plaintiffs who would suffer no real harm from a proposed development, but that brought the case simply to delay construction in the hope that a project would go away.

The amendments to Chapter 40A, Section 17, found in H. 4977, are intended to narrow the legal wiggle room that abutters had under the prior iteration of the law. The new law was enacted on an emergency basis and is therefore effective immediately and applicable to pending appeals. The amendments add a new detailed pleading requirement that may result in the dismissal of many abutter appeals at the outset. A complaint in an abutter appeal must now "sufficiently allege and… plausibly demonstrate that measurable injury… will likely flow from the decision through credible evidence." This requirement would seem to eliminate instances where those challenging a permit could simply allege "flooding,"

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"traffic," or "damage to the environment" as harm they would suffer without linking that harm to any specific facts, engineering study, or other appropriate scientific evidence. The amendment also changes the bond requirement to increase the maximum amount of a potential bond from $50,000 to $250,000, which better reflects the actual "costs" that developers incur as a result of delays caused by appeals.

The amended bond requirement clearly spells out that the bond is not only to secure "costs" but is now meant to "secure the payment of and to *indemnify and reimburse damages* and costs and expenses incurred in such an action if the court finds that the harm to the defendant or to the public interest resulting from delays caused by the appeal outweighs the financial burden of the surety or cash bond on the plaintiffs." Courts are still required to weigh the "relative merits" of an appeal when considering a bond motion; however, most importantly, the law as amended expressly provides, "Nothing in this section shall require bad faith or malice of a plaintiff for the court to issue a bond under this section."

Despite the legislature's effort to lower the bar for issuance of a bond, it stopped short of completely changing the standard for a court to ultimately award damages to a developer harmed by a frivolous abutter appeal. Section 17 still only allows an award "if the court finds that the appellant or appellants acted in *bad faith or with malice* in making the appeal to court." The award language was amended to add "including reasonable attorneys' fees" which seemingly is intended to expand the scope of "costs" to include damages and expenses as a result of delay. Rather than provide that "costs shall not be allowed… unless" the amended language now affirmatively gives courts discretion to award costs – i.e., "costs… may be allowed" – if the required finding of bad faith or malice is made.

It remains to be seen whether this most recent amendment to the Zoning Act will have the desired deterrent effect on abutter appeals. Regardless, the legislature has clearly signaled to courts that they must take a closer look at abutter appeals early in the case to determine whether plaintiffs might produce compelling evidence that they will suffer some measurable harm of their legal rights as a result of a proposed development.

Christopher R. Agostino serves as business counsel across a range of industries, including commercial real estate and construction. Chris helps clients navigate complex administrative law matters and land use regulations and he has successfully represented clients in administrative proceedings before federal, state, and local agencies. He can be reached at (617) 570-3501 or cra@riw.com.

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