

COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

Court Found Abutters Appeal of Affordable Housing Project Meritless – Required to Post $35,000 Bond

BY JOSEPH R. DUQUETTE • JULY 10, 2023

In 2020, the legislature amended the Zoning Act, G.L. c. 40A, et seq., to include language which would require a plaintiff appealing a decision to approve a special permit, variance or site plan to post a surety or cash bond in an amount of not more than $50,000 to secure the payment of costs ***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. In *Marengi, et al. v. 6 Forest Road, LLC, et al.* 491 Mass. 19, (2022), the SJC took the case on its own motion and stated "the bond provision exists 'to secure the payment of costs,' and costs ultimately cannot be awarded in the absence of bad faith or malice, the bond provision requires a preliminary determination regarding the 'relative merits of the appeal.'" The SJC accordingly remanded the case back to superior court for a determination of bad faith.

On remand, the court found that the plaintiffs' claim that the ZBA erred because it granted the comprehensive permit after the town had reached the 10% statutory minimum affordable housing obligation was "so devoid of merit that it may be reasonably inferred to have been brought in bad faith." This decision is good news for developers of affordable housing projects and municipalities alike as it gives teeth to a provision that sought to provide protections for the development of increased housing opportunities in the Commonwealth against meritless appeals.

The June 21, 2023, Land Court decision *Evans vs. Stafford,* Mass. Land Ct., No. 23 MISC 000134(RBF), reviewing the appeal of the Town of Oxford's Planning Board decision granting a special permit and approving a site plan for the development of a wholesale distribution facility, is the first reported decision to provide a further example of the "bad faith" analysis.

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