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Mass. High Court Clarifies Scope of New Zoning Act Bond Provision

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The Supreme Judicial Court (SJC) last week gave real estate litigators an early holiday gift: an important, clarifying opinion on a recent amendment to Section 17 of M.G.L. c.. 40A (the Zoning Act), which governs appeals to court from decisions of local zoning boards. The case is Marengi v. 6 Forest Road, LLC (pdf).

In 2020, as part of a wide-ranging economic development bill intended to spur housing production, the Legislature added (effective January, 2021) the following paragraph to Section 17:

> The court, in its discretion, may require a plaintiff in an action under this section 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. The court shall consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.

This new provision prompted three key questions. First, while it appears in Section 17 of the Zoning Act, does this language empower a trial court to impose a bond requirement in appeals of permits issued under M.G.L. c. 40B, §§ 20-23 (Chapter 40B), a separate statute that allows developers of affordable housing to override local zoning regulations and receive a single "comprehensive permit"? Second, what legal standard applies to the trial court's exercise of its discretion to impose a bond? And third, what is the scope of the "costs" that the bond is meant to secure payment of?

In *Marengi* the SJC answered the first question "yes." While Chapter 40B has its own appellate route for developers who are denied a comprehensive permit or who receive a permit with objectionable conditions, Section 21 of Chapter 40B states that abutters and other persons aggrieved by the *issuance* of a comprehensive permit "may appeal to the court as provided in [Section 17 of Chapter 40A]." The SJC started with this express incorporation of Section 17 into Chapter 40B, but noted that the new bond provision states it applies to actions "appealing a decision to approve a

special permit, variance or site plan . . . .” Had the Legislature included the words “comprehensive permit” in this list there’d be no room for argument. Because it did not, the SJC was left with a less satisfying interpretive hook: the court noted that all comprehensive permits are based on a site plan; therefore, a plaintiff appealing the grant of a comprehensive permit is, in part, appealing a decision to approve a site plan. Perhaps recognizing the tenuousness of this rationale, the SJC pointed to a second, equally tenuous source of support in the language of the bond provision: that the trial court should consider “harm . . . to the public interest” resulting from delays caused by the appeal. The court reasoned that the Commonwealth has a “heightened interest” in promoting the construction of affordable housing, and in “ordinary” variance or special permit decisions the public interest is “less pronounced” or even absent; therefore, the bond provision must apply to appeals of comprehensive permits, which promote the public interest in affordable housing. To its credit, the SJC acknowledged that its textual analysis left “lingering ambiguity,” so it turned to the legislative history of the new bond provision and Chapter 40B itself. It found in both those contexts evidence of a strong legislative intent to promote the creation of low- and moderate-income housing. As the court put it, “we discern no reason why the Legislature would add such a deterrent [as the bond provision] in ordinary zoning cases but not in cases under [Chapter 40B], to which the Legislature has granted enhanced protections in the permitting process in recognition of the critical need for affordable housing throughout the Commonwealth.” With this additional gloss the SJC was comfortable holding that the bond provision applies to appeals of comprehensive permits.

On the second question, the plaintiffs argued that the trial judge erred by ordering them to post a $35,000 bond without first finding that they filed their appeal in bad faith or with malice. They reasoned that the bond is supposed to secure payment of “costs” (more on that below), and under Section 17 the trial court can only award costs if it finds the plaintiff acted in bad faith or with malice; therefore, the court should be required to make such a finding *before* ordering a bond. The SJC disagreed, pointing to the language of the bond provision requiring the trial court to “consider the relative merits of the appeal and the relative financial means of the plaintiff and the defendant.” The court observed that this language doesn’t require the trial court to find bad faith or malice before ordering a bond; rather, it instructs the trial court to consider the “relative merits” of the appeal. This makes sense, the SJC said, because evidence of a party’s state of mind is difficult to prove and usually requires discovery and completion of the fact-finding process. The court concluded that the trial court may order a bond based on its preliminary evaluation of the “relative merits” of the appeal – but this evaluation should be “informed” by the high standard for awarding costs. In other words, the trial court should not order a bond “unless the appeal appears to be so devoid of merit as to allow the reasonable inference of bad faith or malice.”

The SJC’s answer to the third question is the most significant. The plaintiffs argued that “costs” as used in the bond provision should be interpreted like the “taxable costs” to which prevailing parties are entitled under M.G.L. c. 261, § 1. These costs are highly circumscribed and almost comically minimal, such as a maximum attorney’s fee of “two dollars and fifty cents.” The defendant developer argued that “costs” instead should be construed broadly to include expert witness fees and attorneys’ fees, as well as damages caused by delays resulting from the appeal. In the SJC ‘s view “neither party is fully correct.” The court noted the narrowness of the taxable costs authorized by Chapter 261, which the court has held is appropriate since there’s no indication the statute was intended to reverse the default “American Rule” that each party bears its own attorneys’ fees and other litigation expenses. On the other hand, the court noted, some statutes expressly authorize awards of more than just taxable costs where doing so helps “vindicate the policies” of the particular statutory scheme – such as the ability to recover attorneys’ fees in cases under M.G.L. c. 93A where the plaintiff proves the defendant engaged in unfair or deceptive acts or practices. In *Marengi* the SJC decided that, while the new zoning bond provision doesn’t expressly say so, the “costs” to

which it refers are broader than taxable costs. The court found support for this conclusion in the maximum bond amount of $50,000, which could never be approached unless the Legislature contemplated a broader range of costs. The court further noted that the bond provision "is one component of legislation with a unified policy goal: to expand much-needed housing throughout the Commonwealth, in part by deterring frivolous appeals and the delays they cause in construction." However, the court refused to construe "costs" as broadly as the developer sought, noting that the bond provision doesn't mention attorneys' fees or delay damages, nor does it authorize an award of "all costs." The SJC observed that when the Legislature wished to authorize recovery of attorneys' fees or delay damages, "it knows how." Against this backdrop, the court ruled that while "costs" under the bond provision does not include attorneys' fees, it *does* include expert witness and consultant fees. The court concluded:

> This broader set of recoverable costs leaves the bond provision with some deterrent bite and is aligned with the $50,000 limit but does not entail reading in language that is not there by authorizing attorneys' fees or delay damages.

Because the trial court didn't have the benefit of the SJC's interpretation of the bond provision, the SJC remanded the case to the Superior Court for further proceedings.

Marengi is an important decision that will prove most useful to real estate litigators. Not only does it confirm that the new zoning bond provision applies to appeals under Chapter 40B, it clarifies that the "costs" secured by a bond under Section 17 are significantly broader than traditional taxable costs, and include anticipated expert witness and consultants' fees, which can be substantial. I expect this ruling will lead to a sharp increase in the use of the bond provision by developers, which in turn will help deter frivolous zoning appeals and the delays and added expense they (often by design) cause.

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