

Developers Beware: Difficult Multi-Step Process for Obtaining and Cashing In On Appeal Bonds

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Porter v. Bd. of Appeal of Bos., No. 22-P-974, 2024 WL 187241 (Mass. App. Ct. Jan. 18, 2024).

The case of *Porter v. Bd. of Appeal of Boston* is the latest case that involves an eternal question posed by developers: how does a developer whose development permits are challenged obtain compensation from the party who appeals from the permits and entitlements obtained by the developer? In this case, plaintiff Eric Porter (“Porter”) appealed a decision of the Board of Appeal of Boston that granted variances to a developer, Fung & Hsu Realty Associates, LLC (“Fung & Hsu”). The appeal challenged permits issued to Fung & Hsu in connection with its plan to construct an addition to a residential building in Allston (the “Decision”).

After a trial, the Superior Court dismissed Porter’s complaint for lack of standing. Porter appealed the decision. Fung & Hsu filed a motion to compel Porter to post a surety bond (the “Appeal Bond”) as a condition of maintaining the appeal. The Superior Court trial judge ordered Porter to post an Appeal Bond in the amount of \$25,000, which Porter did.

At the Appeals Court, Porter challenged both the dismissal of his complaint and the Appeal Bond order. A 3-judge panel of the Appeals Court held that: (i) the complaint was properly dismissed for lack of standing; and (ii) there was no abuse of discretion by the trial judge’s allowance of the Appeal Bond. However, despite Fung & Hsu’s claim that the appeal was frivolous, the panel denied Fung & Hsu’s request for the attorney’s fees and costs that it had incurred in defending the appeal.

After the Appeals Court panel had affirmed the trial court’s ruling dismissing Porter’s challenge to the permits, Fung & Hsu asked the trial court for a disbursement of the Appeal Bond to cover the attorney’s fees and costs it had incurred in defending Porter’s appeal. A Superior Court judge,

different from the original trial judge and imposer of the Appeal Bond, authorized a disbursement of \$23,979.99 for fees and costs. Porter then appealed the disbursement order.

A 3-judge panel of the Appeals Court vacated the disbursement order. The Appeals Court explained that “[t]he purpose of an appeal bond is to provide security to the appellee for compensable damages and costs should it prevail in the appeal.” However, the Appeals Court emphasized that an appellee is not automatically entitled to a disbursement simply because it prevailed in an appeal. The Appeals Court cited to the “American Rule”—the rule that winning or prevailing litigants are responsible for their own litigation expenses unless a statute, court rule, or case law says otherwise. The Appeals Court explained that a successful appellee may be entitled to attorney’s fees if an appeal is frivolous, but that determination is “left to the sound discretion of the appellate court.”

The Appeals Court went on to say that since the first Appeals Court panel had rejected Fung & Hsu’s request to disburse the Appeal Bond for delay costs occasioned by Porter’s appeal, Fung & Hsu was not entitled to a disbursement on that basis. The Appeals Court then held that the trial court had no authority to disburse the Appeal Bond on the developer’s claim that Porter’s appeal was frivolous as this issue was reserved to the Appeals Court and the trial court was not empowered to make that determination. The Appeals Court noted that since the developer’s claim that the appeal was frivolous was also rejected by the first Appeals Court panel, the issue had been decided and the trial court’s decision to allow a disbursement of the Appeal Bond on that basis “cannot stand.”

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National Law Review, Volume XIV, Number 114

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