NewsRoom

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School costs rejected as basis for permit denials

Kris Olson

The cost of educating school-age children who might move into newly constructed housing units is not a valid ground on which to deny a developer's request for a special permit, two Land Court judges in different cases have ruled within the span of just over a month.

In each case, the developer was seeking to convert the site of a shuttered restaurant into multiple units of mostly market rate housing, though one of the projects was to have one deed-restricted affordable unit.

Both municipalities would eventually justify their denials of the requested zoning relief in part by pointing to the projected increase in the number of school-age children the projects would bring into the community.

While the Appeals Court had flirted with the issue a decade ago, no Massachusetts court had definitively addressed the question of whether the negative fiscal impact on a public school system is a legally tenable ground that may be considered by a municipal authority in deciding whether to approve a housing proposal, Judge Howard P. Speicher noted in his Nov. 2 decision in The Bevilacqua Co., Inc. v. Lundberg, et al.

Speicher grounded his decision in the so-called "education clause" of the Massachusetts Constitution, which "imposes an enforceable duty … to provide education in the public schools … without regard to the fiscal capacity of the community or district in which such children live."

Speicher said that, similar to when claimed injuries to the value of abutters' properties must yield to public policy encouraging the construction of affordable housing under G.L.c. 40B, so too should the guarantee of the right to a public education take precedence over local zoning preferences when considering a special permit application.

"Since a public school education must be provided to children 'without regard to the fiscal capacity of the community,' it would be anomalous to countenance the denial of a special permit based on a reason that contravenes that constitutional obligation," he wrote.

On Dec. 11, in the case 160 Moulton Drive LLC v. Shaffer, et al., Judge Robert B. Foster agreed.

"Denial of a special permit on the grounds that increased tax revenue would not support the education of the children living therein is tantamount to conditioning the availability of public services on the ability of the residents to pay for them, which I find to be unreasonable and arbitrary," Foster wrote.

The full text of the 34- and 38-page decisions, Lawyers Weekly Nos. 14-108-20 and 14-096-20, respectively, can be ordered here and here.

No consensus

One of the plaintiff's attorneys in 160 Moulton Drive, Jesse D. Schomer of Wakefield, noted that attempts by local boards to cite increased school enrollment as a reason to thwart development have been "starting to pop up all over the place," in the context of both affordable and market rate developments, and even — somewhat nonsensically — senior housing developments.

The judges' decisions send a clear message that such concerns are not an appropriate consideration in the context of zoning, he added.

The plaintiff's attorney in Bevilacqua, Arnold E. Cohen of Sharon, said the decisions should have an impact, given the simple fact that appeals of denials of special permits are difficult to win. Here, the judges even went a step further, ordering the permits be granted rather than giving the local boards another bite at the apple on remand.

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"Where a bylaw requires the special permit granting authority to consider 'fiscal impact,' it would not make sense to ignore the single largest fiscal burden on municipalities, which is the cost of education."— Thomas A. Mullen, Lynnfield

[divider]But Lynnfield attorney Thomas A. Mullen, who represented the defendants in both cases, continues to believe that there should be room for considering increased school costs as part of the permitting process.

"Where a bylaw requires the special permit granting authority to consider 'fiscal impact,' it would not make sense to ignore the single largest fiscal burden on municipalities, which is the cost of education," he said.

Mullen said he does not believe that taking the cost of education into account in land use decisions violates the state constitutional requirement of providing an education for all school-age children in the community.

"The question is whether a town has the right to prefer a commercial use in a particular area, which generates no school costs and can be taxed at a higher rate than residential property, over a residential use that is likely to impose greater costs on the public schools," Mullen said.

Northampton land use attorney Michael Pill said he was sympathetic to that point of view.

Drawing on his master's degree in urban planning, Pill said he has long considered it "axiomatic" that residential development generally has such a negative financial impact.

"In contrast, industrial and commercial development, which is capital intensive, generally has a positive impact on municipal finances," he said.

Speicher and Foster were correct that the negative financial impact on a municipality of residential development is not expressly identified as a consideration that can be considered under G.L.c. 40A or local zoning bylaws and ordinances, Pill said.

"Unfortunately, the law in this instance does not reflect fiscal reality," he added.

Pill said he would like to see either the Legislature or the appellate courts broaden the definition of "substantial detriment" to include the financial impact of development on the taxpayers of a municipality.

"The law's failure to take such impacts into account means that all of the municipal taxpayers are in effect subsidizing residential development, which should be required to pay its own way, perhaps through 'impact fees,'" he said.

But others, including Boston attorney Brian C. Levey, see the actions taken by the Gloucester and Lynnfield special-permit granting authorities as emblematic of the resistance encountered by builders and developers to multi-family housing projects, which partially explains the state's housing crisis.

[divider]"Concerns over school enrollment and fiscal impacts, even if they are earnestly, subjectively felt by a particular community, act in effect as stalking horses for maintaining housing segregation here in Massachusetts, and throughout the country."

— Nicholas P. Shapiro, Boston[divider]

While there are plenty of thoughtful, diligent zoning board members in the state, arbitrary decisions like those in Bevilacqua and Moulton "happen a lot more than you would hope," agreed Boston real estate litigator Nicholas P. Shapiro.

"Concerns over school enrollment and fiscal impacts, even if they are earnestly, subjectively felt by a particular community, act in effect as stalking horses for maintaining housing segregation here in Massachusetts, and throughout the country," Shapiro said.

However, Lynnfield had already reached the state's goal of having 10 percent of its housing stock be affordable, while the proposed new project would be luxury apartments, Mullen noted.

"This was not a case where a rich community was seeking to keep out people of modest means," he said.

Flimsy denials

The project in Bevilacqua is to be sited in a neighborhood containing an "eclectic mix" of single-family and small multi-family residential uses, as well as commercial and marine uses.

Bevilacqua Co. proposed razing the existing long-vacant restaurant and replacing it with a pair of three-story multi-family townhouse style buildings, each containing four units.

The Gloucester Zoning Board of Appeals granted the project the necessary variances, but the City Council failed to follow suit with the required special permits. Needing a two-thirds vote to pass, the proposal garnered only three votes in favor and five opposed, with one member absent.

The City Council offered little explanation for its vote but may have been swayed in part by an informal straw poll it had taken at a public hearing, which found nine members of the audience in favor and 49 opposed.

[box type="shadow" align="alignright" width="300px"]160 Moulton Drive LLC, v. Shaffer, et al.; The Bevilacqua Co., Inc. v. Lundberg, et al.

THE ISSUE: Can the cost of educating school-age children who might move into newly constructed housing units form the basis of a denial of a developer's request for a special permit?

DECISION: No (Land Court)

LAWYERS: Arnold E. Cohen of Sharon (plaintiff in The Bevilacqua Co.)

Jesse D. Schomer and David J. Gallagher, of Regnante Sterio, Wakefield (plaintiff in 160 Moulton Drive)

Thomas A. Mullen of Lynnfield (defense in both cases)

Krisna M. Basu of Swampscott; Gloucester City Solicitor Charles J. Payson (defense in The Bevilacqua Co.)

Yael Magen of Lynnfield (defense in 160 Moulton Drive)[/box]

Meanwhile, the project in 160 Moulton Drive is planned for the former site of the Bali Hai restaurant in Lynnfield that closed for good on New Year's Eve 2018.

In its place, 160 Moulton Drive LLC plans to build a 23-unit market rate apartment building.

Two members of the three-member Lynnfield Zoning Board of Appeals voted to approve the project, but it needed a unanimous vote to prevail.

The dissenting member cited five reasons for his vote, including that the increased tax revenue from the project would not offset the extra cost of educating the school-age children predicted to move in.

Speicher found that the Gloucester City Council's decision denying the requested special permits was "legally untenable, arbitrary, capricious, unreasonable, and otherwise beyond the proper exercise of the City Council's lawful authority."

Meanwhile, Foster ruled that the Lynnfield ZBA's finding that the project would be "substantially more detrimental to the restaurant use was unreasonable and arbitrary and capricious."

Scant evidence, too

Having found that the standard utilized by the Gloucester City Council was not legally tenable, Speicher said he did not need to consider whether any rational view of the facts supported its conclusions.

But even applying that standard, he found that the City Council's denial fell short.

With respect to the estimated number of school-age children the project would bring to the town, the City Council offered the testimony of the city's recently retired school superintendent.

But the superintendent had based his estimate that five or six new students would enter the school by extrapolating from the number of school-age children living at a single multi-family dwelling in Gloucester.

"One does not need to be an expert statistician or demographer to know that cherry-picking one building from which to extrapolate instead of relying on a statistically significant number of similarly situated other buildings from which to draw a conclusion will not lend itself to a reliable result," Speicher wrote.

Even if the project did bring as many as six new children into the Gloucester schools, it would be speculative to conclude that they would raise the cost of operating the schools, given the retired superintendent's testimony that the student population might fluctuate by as many as 100 students in a given year, Speicher said.

There was a similar flaw with the town's position in the Lynnfield case. The developer's expert conservatively estimated that the project would bring with it four students, two who would be in middle or high school, and two who would enroll in the local elementary school, the Huckleberry Hill School.

The current Lynnfield superintendent testified that the enrollment at the Huckleberry Hill School had "skyrocketed" in recent years. But Foster found that, even with the increased enrollment, there were 40 total open spaces at the school, and none of the grade levels was at capacity under the town's own guidelines.

---- Index References ----

Company: GENERAL LIGHTING CO

News Subject: (Education (1ED85))

Industry: (Housing (1HO38); Real Estate (1RE57); Residential Real Estate (1RE67); Zoning (1ZO58))

Region: (Americas (1AM92); Massachusetts (1MA15); North America (1NO39); U.S. New England Region (1NE37); USA (1US73))

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Other Indexing: (Bevilacqua Co. Inc.; Moulton Drive LLC) (Sharon; David J. Gallagher; Krisna M. Basu; Thomas A. Mullen; Nicholas P. Shapiro; Brian C. Levey; Charles J. Payson; Jesse D. Schomer; Shaffer; Lundberg; Robert B. Foster; Howard P. Speicher; Michael Pill; Arnold E. Cohen; Yael Magen)

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