Neighborhood conservation bylaw invalidated by judge

'Creature of zoning' must abide by 40A

By: Kris Olson October 3, 2019

A town's "neighborhood conservation district bylaw" must be invalidated because it is a zoning bylaw "illegitimately masquerading" as a general bylaw, a Land Court judge has ruled.

A company seeking to develop a 70-acre parcel sued after the town of Brookline responded to its plans by convening a special Town Meeting and passing a general bylaw that both set out the framework to create "neighborhood conservation districts" and specified that the first of the districts would encompass the plaintiff company's property.

The town argued that the bylaw was a legitimate exercise of its home rule powers or, even if it should have followed the procedure for amending its zoning bylaws under the Zoning Act, G.L.c. 40A, or the state law governing the creation of historic districts, G.L.c. 40C, it had "substantially complied" with those procedural requirements.

But Judge Howard P. Speicher disagreed, opening his opinion with a quote from the Marx Brothers' movie "Monkey Business." He then summarized the plaintiff's ultimately winning argument by paraphrasing Chico and Groucho.

"In short, the plaintiff contends that the town has elected not to smell the stable so that it might insist that it is a barn," he wrote.

Counsel for developer

Speicher said it would frustrate the purpose of Chapter 40A if municipalities could utilize their general police power to enact what are essentially zoning regulations, thereby dodging the stricter requirements for enactment under the Zoning Act.

The town tried to rely on the Supreme Judicial Court's 1979 decision in *Lovequist v. Conservation Commissioner of Dennis* for the proposition that not all ordinances or bylaws that regulate land use are zoning laws.

But Speicher found that "[a]ll that the Dennis [wetlands protection] bylaw in *Lovequist* was not, the [Neighborhood Conservation District] Bylaw is."

With its focus on the construction and siting of buildings, Brookline's bylaw "loudly echoes the central objectives of zoning," he added.

Not a close call?

Boston attorney David L. Klebanoff, who represents the plaintiff developer in *Hancock Village*, said that a key difference between other neighborhood conservation districts —including the second one created in Brookline — and the one foisted on his client is that other property owners were given a voice and a vote as to whether they wanted their properties to be encompassed by a newly created district.

Hancock Village I, LLC v. The Town of Brookline, Lawyers Weekly No. 14-085-19 (37 pages)

THE ISSUE: Can a municipality pass a "neighborhood conservation district bylaw" as a general bylaw if it regulates subject matter falling within the traditional definition of zoning?

"My client wasn't even told [the bylaw proposals] were going before Town Meeting until the day before they closed the warrant," Klebanoff said.

When he reviewed the case law, including the SJC's 1975 decision in *Rayco Inv. Corp. v. Bd. of Selectmen of Raynham* and the Appeals Court's 2011 decision in *Spenlinhauer v. Town of Barnstable*, Klebanoff said it did not even look like a close call.

He said he was pleased Speicher agreed, to the degree that he added spot zoning to the rationale for his decision, an issue Klebanoff said he did not dare raise, given how rarely spot zoning arguments succeed.

DECISION: No (Land Court)

LAWYERS: David L. Klebanoff of Gilman, McLaughlin & Hanrahan, Boston (plaintiff)

Luke H. Legere and Olympia Bowker, of McGregor & Legere, Boston (defense)

Brookline's attorney, Luke H. Legere, did not respond to requests for comment.

But Boston land use lawyer Kate Moran Carter agreed that, given the stated purpose of Brookline's bylaw, Speicher's decision was "almost inevitable."

"The Brookline bylaw talks about the grouping of buildings, the layout of neighborhoods, circulation, open space, and the impacts of development on adjacent structures and uses," she said. "This is Zoning 101: What are the rules governing how a community will be laid out?"

Given that Brookline already had a comprehensive, detailed zoning bylaw with various levels of review, the need to create yet another board to regulate many of the same subjects, which could potentially reach a different result under different standards, was always going to be a tough sell, said Boston attorney Diane C. Tillotson.

"Frankly, I'm surprised it got by the attorney general," she said.

Speicher aptly recognized that the procedural protections and rights of appeal under Chapter 40A were developed for a good reason, Tillotson said.

Municipalities may want to take the ruling as a signal that it might make more sense to go down the road of amending their zoning bylaws to accomplish "neighborhood conservation," said Boston attorney Diane C. Tillotson.

"All bylaws are a restraint on someone's ability to use their property," she said.

Municipalities may want to take Speicher's decision as a signal that it might make more sense to go down the road of amending their zoning bylaws to accomplish "neighborhood conservation," she added.

That was a particular missed opportunity here, Tillotson said, in that Brookline seemingly could have attained the necessary two-thirds majority at Town Meeting to effect such a change.

Boston land use attorney Nicholas P. Shapiro said he was pleasantly surprised by how comprehensive Speicher's decision was.

"Given the de novo standard of review on appeal for summary judgment decisions, trial-level judges can easily and reasonably feel the urge to say very little — your decision and reasoning will be shown no official, formal deference on appeal," he said.

Nonetheless, he said, there is value in the trial court "showing its work," particularly when, as in *Hancock Village*, the judge's action is as sweeping as the wholesale invalidation of a local enactment, which courts have said should be rare and extraordinary.

"Here, Judge Speicher has proven that judicial deference does not have to entail judicial abdication," he said.

Objection raised

Plaintiff Hancock Village I, LLC owns Hancock Village, a 70-acre mixed-use development consisting of 789 garden-style apartments, 530 of which are in Brookline, with the remainder in the 20-acre portion of the property that lies over the city line in Boston.

In August 2011, Hancock Village submitted to Brookline's building commissioner a proposal to develop 31 detached single-family homes and 162 dwelling units in a multi-family building on the property.

That fall, Brookline convened a special Town Meeting to discuss two warrant articles. The first proposed to insert a section into Brookline's general bylaws titled "Neighborhood Conservation Districts," setting out the framework for the operation of such districts in the town.

The NCDs were to be overseen by a commission of at least five members. The board would be given broad discretion to review whether a project was compatible with the bylaw's design guidelines and could impose dimensional requirements "that further the purposes of the by-law."

The other article proposed to create the Hancock Village Neighborhood Conservation District, applicable solely to Hancock Village's property. In the Hancock Village NCD, buildings were to be limited to two-and-a-half stories, among other restrictions.

In November 2011, Town Meeting voters approved the articles by votes of 183-35 and 200-24, respectively, margins that were well in excess of the two-thirds majority that would have been needed had the bylaws been proposed as zoning amendments.

Hancock Village has since secured a comprehensive permit to build an alternative project for affordable housing under G.L.c. 40B, which would be exempt from the requirements of the NCD bylaw. An appeal by abutters of the granting of that comprehensive permit failed in the summer of 2018.

On April 3, 2018, Hancock Village filed suit in Land Court, seeking declarations that the section of Brookline bylaws had been enacted invalidly and were of no force and effect.

The parties agreed to file cross-motions for summary judgment on Feb. 15, 2019, on which Speicher heard arguments on May 7.

Strict compliance required

As for the town's argument that it had "substantially complied" with the provisions of G.L.c. 40A, Speicher noted that the SJC had rejected a similar argument in 1972's *Canton v. Bruno.*

"Strict compliance, however, brooks no equivalence," Speicher wrote.

Even if the town had complied with the procedural requirements for adoption of a zoning bylaw, the bylaw would be invalid for failing to include or incorporate "the many substantive protections of G.L.c. 40A," Speicher added.

For example, the bylaw did not provide for zoning relief in the form of special permits or variances, instead substituting types of approvals and relief not sanctioned by G.L.c. 40A, Speicher said.

"Perhaps most egregiously," he wrote, the bylaw provided no specific avenue of appeal beyond "a limited record review by an action in the nature of certiorari."

As for violating the uniformity provisions of G.L.c. 40A, §4, Speicher explained that occurs when a bylaw "is so general in its grant of powers as to effectively provide a permit granting authority with unbridled discretion to fashion its own requirements on an ad hoc basis."

Speicher likened the Brookline bylaw to the "seminal example" of a uniformity violation found in the Appeals Court case *SCIT v. Planning Board of Braintree.*

Like the bylaw in *SCIT*, the Brookline bylaw "provides virtually unlimited discretion, guided only by very general statements of purpose, to create dimensional zoning requirements from whole cloth, and to do so on a case-by-case basis, resulting in the very antithesis of uniform application," Speicher wrote.

Spot zoning is a variant of violation of the principle of uniformity required by G.L.c. 40A, §4, he said.

"Where a single parcel is re-zoned at the behest of citizens objecting to a particular proposed use of the parcel, such re-zoning violates the uniformity principle and is invalid spot zoning," Speicher wrote, citing to the SJC's decision in *Schertzer v. City of Somerville*.

There is "no doubt" that frustrating a property owner's efforts to develop a particular use on its property was Brookline's purpose in adopting the NCD Bylaw, he said.

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