

PAUL MCMORROW

## Using the courts to stall development

By Paul McMorrow      SEPTEMBER 27, 2011

CHAPTER 40B, Massachusetts's affordable housing law, is supposed to speed the construction of moderately priced homes by streamlining the often-rocky process of securing local development permits. But as one stalled affordable development shows, it's often not the permitting process that puts projects on ice, but the protracted court fights that inevitably follow.

A state appeals court issued a ruling last week that should allow one long-delayed 40B project, Cedar Ridge Estates, to move forward. The Cedar Ridge project, first proposed in 2004, would build 200 condominiums, including 50 affordable units, on 53 acres in Holliston.

It's the sort of development project that should appeal to a wide range of constituencies. It would bring some density to the western suburbs, where large-lot zoning has long been used to constrain growth. It would put a polluted former dumping ground back into productive use. And it would add 50 moderately-priced units to a town where just over 3 percent of the housing stock is affordable.

Holliston officials have opposed the 40B project on environmental grounds. They've said the condo development would damage wetlands and create harmful storm water runoff, and endanger the public health. This, despite the fact that the project site used to be a fetid dumping ground. It remains dangerously polluted, and any residential development on the site would include significant environmental remediation.

The state Department of Environmental Protection began cleaning up the Holliston site nearly 15 years ago. It spent \$1.75 million on the effort, but the site remains plagued by groundwater contamination. By law, no residential developer can build on the site

without finishing the environmental cleanup.

Holliston fought the project by trying to enforce the regulations which are more stringent than the state's. The town also objected to a lack of specificity in the developer's cleanup plans - vagueness largely driven by the uncertainty surrounding the remaining groundwater contamination at the development site. The appeals court swatted these arguments aside, saying that the state Supreme Judicial Court has long been critical of municipalities that appear to use environmental concerns to block developments that they oppose for other reasons.

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The 40B statute was supposed to remove obstacles to housing development, especially development targeted for low- and moderate-income residents. The law allows a developer to submit a single development proposal, instead of shuttling between multiple planning and environmental agencies. And it allows a state panel to circumvent local zoning, and order municipalities to issue development permits to affordable housing projects, in communities where less than 10 percent of the housing stock is affordable.

The ability to trump local regulations is critical to making the law work - in theory, at least. In New England, municipalities, not counties, set land-use rules. The Legislature enacted Chapter 40B because local land-use rules, like low-density large-lot zoning, stymie new construction and artificially inflate home prices. The law recognizes that the state has a broad interest in encouraging new housing construction, while the municipalities that control development permits often have a very narrow interest in opposing new construction.

The Holliston case shows this dynamic at work. But it also shows the inefficiency of 40B in actually achieving new housing development. The Cedar Ridge developer, Michael Norton, ran a 20-month permitting gauntlet, only to be denied his development permit in 2006. He appealed to the state board that mediates 40B disputes, which ordered the town to issue development permits to the project in early 2009. The town sued, lost its bid to halt the project in the Land Court, appealed that decision, and lost again.

In 40B disputes, municipalities have to show that their local concerns outweigh regional housing needs, and they can't use restrictive zoning and local ordinances as pretext for preventing development. This standard isn't new, and it shouldn't have come as a surprise to the Holliston officials who wound up on the losing side of the courtroom fight.

That's because, in many respects, project opponents got exactly what they wanted to get out of this fight: It's been five years since the town denied permits to the Cedar Ridge 40B project, and seven years since it was first proposed, and the project isn't close to getting in the ground.

*Paul McMorrow is an associate editor at CommonWealth Magazine. His column appears regularly in the Globe.*

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