

No. SJC-13316

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

TERRENCE MARENGI JR., et al.,
Plaintiffs-Appellants,

v.

6 FOREST ROAD LLC, et al.,
Defendants-Appellees

On Interlocutory Appeal from an Order
of the Appeals Court

**BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL
FOUNDATION IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17(c)(1), amicus curiae New England Legal Foundation (NELF) states that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

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INTEREST OF AMICUS CURIAE¹

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses in New England, other business and non-profit organizations, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

As Amicus explains in the first half of this brief, adequate stocks of affordable housing are necessary for the development and prosperity of our state's workforce and indeed for the growth of the state's entire economy. The Commonwealth, however, suffers from a persistent, continuing shortage of such housing. In 1969 the Legislature acted to simplify permitting for construction of affordable housing and instituted

¹ No party or party's counsel nor any other individual or entity, aside from Amicus and its counsel, authored this brief in whole or in part, or made any monetary contribution to its preparation or submission. Neither Amicus nor its counsel has ever represented any party to this appeal on similar issues, and they have not been either a party or counsel to a party in a proceeding or transaction that is at issue in this appeal.

comprehensive permits. The comprehensive permitting scheme has long been an important means to deal with the housing problem. In 2020 the Legislature acted again, enacting legislation aimed, in part, to reduce a variety of costly delays that plague the construction. Among other things, it amended c. 40A, §17, giving judges the discretion to impose a bond on appellants as a disincentive to their bringing meritless appeals of certain land-use approvals. That amendment is now the subject of this appeal.

NELF has defended the operation of the comprehensive permitting system in earlier amicus briefs in this Court and the Appeals Court. Because NELF believes that its views may be of assistance to the Court, it has filed this brief in response to the Court's request for amicus briefing.

ISSUE PRESENTED

“Where the bond provision of G. L. c. 40A, § 17, provides that a court may, in its discretion, require a plaintiff who is appealing to the trial court from “a decision to approve a special permit, variance or site plan” to post a surety or cash bond to secure payment of costs, whether the bond provision applies to a plaintiff who is appealing from a comprehensive permit issued pursuant to G. L. c. 40B.”

ARGUMENT

In 1969 the Legislature instituted comprehensive permits by amending c. 40B. *See* St. 1969, c. 774. The purpose of the new permitting scheme is “to provide relief from exclusionary zoning practices which [have] prevented the construction of badly needed low and moderate income housing.” *Zoning Board of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, 436 Mass. 811, 814 (2002), quoting *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 354 (1973). In order to achieve this purpose, the new statutory scheme establishes a permitting process more “streamlined” than the usual practice. *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, 457 Mass. 748, 754-55, 761 (2010).

The process of obtaining the necessary approvals to construct affordable housing was “streamlined” in part by requiring local zoning boards of appeals to provide one-stop shopping to developers for all of the required municipal approvals. As c. 40B, §21, says, the scheme substitutes a “single application to build such housing in lieu of separate applications to the applicable local boards.” Section 21 goes on to summarize the scope of the boards’ powers under the scheme of comprehensive permitting:

The board of appeals . . . shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section.

The result of a favorable decision by the board is the issuance to the developer of a comprehensive permit. *Id.* (board “shall forthwith issue a comprehensive permit or approval”).

Despite considerable progress achieved over the years under these streamlined procedures, the housing problems that the 1969 act was intended to address have persisted. In 2003, more than thirty years after the act’s passage, one study found that Greater Boston still “face[d] a serious housing crisis that threatens the continued economic growth of the region.”

Few dispute the idea that Greater Boston faces a serious housing crisis that threatens the continued economic growth of the region. Evidence of a housing crisis in the Boston area includes high apartment rents, high home prices, and an insufficient supply of housing units. The lack of a varied housing stock prices many workers out of the market—and drives both households and businesses out of the region, including entrepreneurs and their colleagues who are engaged in the start-up phase of business.

The housing crisis is real. Families report that their children are moving out of the Greater Boston region because of the lack of housing affordable to even middle-class households.

Businesses report that they cannot expand, and sometimes even need to move, because of the high cost of housing.

Charles C. Euchner, *Getting Home: Overcoming Barriers to Housing in Greater Boston* at vi, 42 (Pioneer Institute for Public Policy Research, 2003), available at <https://pioneerinstitute.org/download/getting-home-overcoming-barriers-to-housing-in-greater-boston/> (last accessed September 2, 2022).

Acting once again to remedy the problem, in 2020 the Legislature passed an “emergency law necessary for the immediate preservation of the public convenience” because “deferred operation of this act would tend to defeat its purpose, which is to forthwith finance improvements to the commonwealth’s economic infrastructure and promote economic opportunity.” St. 2020, c. 358. Nearly twenty years after the 2003 study cited above, in this act the Legislature recognizes the urgent, continuing need for more housing in the Commonwealth, especially affordable and multifamily housing.

Indeed, housing is mentioned over two hundred times in the 2020 act and the word affordable occurs nearly three dozen times. Throughout the act runs the theme of the importance of such housing to the expansion and development of the state’s workforce and economy. For example, the act provides \$50 million “in the form of grants or

loans to accelerate and support the creation of low-income and moderate-income housing in close proximity to transit nodes.” St. 2020, c. 358, §2. Similarly, in the section immediately preceding the one that is the focus of this appeal, the Legislature requires only a simple majority vote to approve special permits authorizing multifamily housing located within 1/2 mile of certain forms of mass transportation. *Id.* §24.

Section 25 of the act amends c. 40A, §17, which, *inter alia*, governs appeals by persons “aggrieved by the issuance of a comprehensive permit or approval.” c. 40B, §21 (providing “aggrieved” persons may appeal “as provided in section seventeen of chapter forty A”). The amendment is clearly directed at discouraging the use of meritless or nuisance litigation intended to delay vitally needed housing construction. Specifically, it inserts into §17 the following two sentences:

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.

St. 2020, c. 358, §25.

The question posed in this case asks whether an appeal of the approval of a comprehensive permit is within the scope of §17 as amended.

As the name suggests, a comprehensive permit is essentially a container comprehending all the approvals that would normally be given individually by the separate permit-granting authorities of a municipality; it contains as well all of the approvals of the subsidizing agency that are required at this stage of the project. c. 40B, §21; 760 C.M.R. 56.04. In that sense, comprehensive permits may be “distinct” (Amended Brief of Appellants (Pl. Am. Br.) at 20) from special permits and variances, but there is more to it than that. Rather, to be true to the scheme’s intended operation, one must look *inside* the comprehensive permit and examine the various forms of approvals that go into it. For that reason, the absence of comprehensive permits from the list of appeals subject to a §17 bond does not dispose of the question either on a “plain language” basis or under the rule of *expressio unius est exclusio alterius*, contrary to the Plaintiffs’ view (Pl. Am. Br. at 17 & n. 6).

From §17 Amicus will focus on appeals of site plan approval.

Massachusetts statutes do not recognize site plans specifically as an independent method of land-use regulation. *Osberg v. Planning Board of Sturbridge*, 44 Mass. App. Ct. 56, 57 (1997). However, site plan approval as a permissible regulatory tool for controlling aesthetic, environmental, and other aspects of land use has been recognized since *Y.D. Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970), and a town zoning board of appeals or its planning board generally conducts a site plan review. *Osberg*, 44 Mass. App. Ct. at 57.

As set out in regulations issued by the Department of Housing and Community Development to implement c. 40B's comprehensive permit procedures, eligibility for such a permit depends on approval of the site plan. *See* 760 C.M.R. 56.04(1), (4)(b), and (4)(c). That approval is one of the many approvals contained within a comprehensive permit. Specifically, there must be a site visit, and there must be actual findings that "the site of the proposed Project is generally appropriate for residential development" and that "the conceptual project design is generally appropriate for the site on which it is located, taking into consideration factors that may include proposed use, conceptual site plan and building massing, topography,

environmental resources, and integration into existing development patterns.” 760 C.M.R. 56.04(4)(b) and (c).

In addition, the comprehensive permit statute and its implementing regulations provide that one way in which a zoning board may dispose of a comprehensive permit application is by approving it with conditions “with respect to height, *site plan*, size,” etc. *See* c. 40B, §21; 760 C.M.R. 56.05(8)(b) (emphasis added). The only caveat is that the board may not impose conditions that differ in certain respects from certain minimum requirements. *See* 760 C.M.R. 56.05(8)(c).

Obviously then, whether a board decides to impose conditions on a site plan approval or not, approval of a site plan is a necessary element in the issuance of a comprehensive permit.

Here, for example, site plan approval was given as part of the applicant’s qualifying for the comprehensive permit as per 760 C.M.R. 56.04(1), (4)(b) and (4)(c). Thus, in the Conditions of Approval section of its decision the Salisbury board approved the comprehensive permit subject to “Said construction [being] carried out consistent with Final Plans as defined herein . . . [and] modified as necessary to comply with this Decision.” *See* Comprehensive Permit Decision, dated August 26, 2021, at 5. The board then lists the “Site Plans” sheet by sheet. *Id.* As

we have noted, such a decision is consistent with statute and regulation, both of which allow a board to dispose of an application by granting site plan approval with conditions as an intrinsic part of the approval of the comprehensive permit itself.

In their brief (Pl. Am. Br. at 20), the Plaintiffs appear to confuse waiver of the local Salisbury requirements for Site Plan Review (Article XVIII of the Salisbury Zoning Bylaw), *see* Comprehensive Permit Decision at 24, with a complete absence of site plan approval in the comprehensive permitting process. Rather, as Amicus has shown, approval of the site plan is an eligibility requirement and is therefore necessarily “folded” into the approval of any comprehensive permit. Hence, appeal from the approval of a comprehensive permit necessarily implicates site plan approval and is within the scope of §17.

Moreover, in their appeal the Plaintiffs have in fact put actively at issue the approval of the siting and site plans of the Salisbury project.

They declare as much in their Complaint, saying:

65. The Board acted arbitrarily, capriciously and abused its discretion, by granting a comprehensive permit for the Project without fully vetting impacts on Plaintiffs’ abutting properties, including public health effects from water quality and quantity, public safety effects from the dead-end road that is more than three times the length allowed, and environmental impacts to the extensive wetlands on the Project Site.

66. The Board acted arbitrarily, capriciously and abused its discretion, by granting a comprehensive permit for the Project without considering the additional development potential of Developer's 5.7 acres across the street from the Project Site and impacts that both would have on the neighborhood and Plaintiffs' properties.

Complaint ¶¶65-66. These criticisms fall squarely within the areas of concern set out in the regulations dealing with site plan approval. *See* 760 C.M.R. 56.04(4)(b) and (c). (“the site of the proposed Project is generally appropriate for residential development”; “the conceptual project design is generally appropriate for the site on which it is located, taking into consideration factors that may include proposed use, conceptual site plan and building massing, topography, environmental resources, and integration into existing development patterns”).

The Plaintiffs therefore are doubly wrong in contending that amended §17 “does not apply to appeals of comprehensive permits like the one at issue here.” Pl. Am. Br. at 14.

CONCLUSION

The Court should therefore answer yes to the question posed in the Amicus Announcement and thereby affirm the order of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I certify that this brief complies with the rules pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. A. P. 16, 17, 18, 20, and 21, where pertinent. The document was composed on Microsoft Word 2003 in 14-point Times New Roman. As determined by Word's word-count tool, the number of **non-excluded words** in this brief is **2,334** and the number of **excluded words** is **649** See Rules 16(a)(5-11) and (k) and Rule 20(a)(2)(C), (D), and (F).

Dated: September 12, 2022

/s/ John Pagliaro

John Pagliaro

CERTIFICATE OF SERVICE

In *Terence Marengi Jr. et al. v. 6 Forest Road LLC et al.*, pending in the Supreme Judicial Court, No. SJC-13316, I certify that on the date subscribed below, on behalf of New England Legal Foundation, I served the Brief of Amicus Curiae New England Legal Foundation by e-file on counsel as follows:

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