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Developers given green light to fight sham lawsuits with change in Massachusetts' anti-SLAPP law

Robert W. Stetson
Bernkopf Goodman LLP

Developing real estate is challenging. From contract negotiations to construction management and public approvals, the list of challenges on any given project can seem endless. Abutting landowners present another significant challenge to the development process.

For decades, abutters — often times, well financed corporations — have abused the right to challenge zoning and other approvals by filing sham lawsuits for unjust gain. Based on a recent change in the law, however, Massachusetts developers can now fight back against these lawsuits and countersue for a misuse of the legal process.

Examples of sham lawsuits filed by abutters abound: a company sues a competitor to keep them out of a geographic market or to delay their store opening; a landowner sues a developer for a payoff; a developer sues another developer to coerce a sale of land.

In one example, Supervalu — the fifth largest food retailing company in the United States — hired a consultant to serve as an agent provocateur under a fictitious name to stir up opposition to a shopping center development near one of its stores and to file sham lawsuits to prevent the development from moving forward. When the developer met this conduct with a countersuit for misuse of the legal process, the court dismissed the developer's claims, leaving the developer without any way to protect itself from these dirty tactics.

The safe harbor for abutters using sham lawsuits has often been state anti-SLAPP laws. The acronym SLAPP stands for strategic lawsuits against public participation. Most states passed anti-SLAPP laws in the 1990s in response to unscrupulous developers using the courts to silence private citizen groups from criticizing their development projects. State legislatures designed these anti-SLAPP laws to curb abusive litigation and to



protect and promote constitutional free speech rights.

Despite these laudable intentions, many state anti-SLAPP laws went too far or were drafted too broadly, in effect giving rise to the type of sham lawsuits and abusive litigation by abutters that we see today. Put differently, although anti-SLAPP laws were meant as a shield to protect private citizens, many well-financed corporations have used them as a sword.

Abutters can, and frequently do, tie up development projects at great expense to prevent competition or to strong-arm a payoff, and then turn around hide behind state anti-SLAPP laws when the developers fight back. This was not the intent of those laws.

Perhaps most significantly, most anti-SLAPP laws contain a mandatory attorneys' fees provision. The fee-shifting mandate under anti-SLAPP is an exception to the "American rule" that a party is generally responsible for its legal fees and costs. This fee-shifting provision created a huge disincentive for developers to fight back against abuse.

Last year, the Supreme Judicial Court of Massachusetts — the highest court in Massachusetts — narrowed the scope of the Massachusetts anti-SLAPP law. The Supreme Judicial Court held that developers can bring countersuits against abutters who file sham lawsuits if the developer can prove that the reason for the countersuit is to vindicate the developer's rights and not to "chill" the First Amendment rights of the abutter.

As a result, for the first time since the Massachusetts anti-SLAPP law was passed in 1994, Massachusetts developers who believe an abutter filed a sham lawsuit may be able to

countersue for damages and other relief.

This represents a sea change in developers' rights. For too long, developers were left helpless against underhanded tactics by well-financed abutters with anti-competitive or commercially extortionate intentions. If developers start fighting back with countersuits, it may spur a tipping point where anti-SLAPP laws are no longer used as a shield for misuse of the legal process.

This could eventually bring an end to sham lawsuits by abutters and



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remove a significant obstacle to development projects across Massachusetts and, perhaps, the country.

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Robert Stetson is an attorney at Bernkopf Goodman LLP in Boston. His practice focuses on litigation involving business, real estate, construction, and contract disputes.