3 Minutes on Permits©

Kevin J. Joyce, Esq. - Doherty Law Offices

Volume II, Issue 2

Fall 2008

Special Points Of Interest In This Issue

Building
New Massachusetts State Building Code now in effect

Zoning
"Mansionization" trend under G. L. c. 40A curbed by the Court

Lending
Court greatly expands lender liability for lenders turned landlord for unoccupied residential buildings under G. L. c. 111 §127I

Sustainable Development
What makes buildings "green" in Boston

Real Estate Litigation
Developer awarded attorney's fees in civil action filed by municipality

The "Greening" Of Boston's Future Real Estate Development

"Green building" is now a part of the real estate development 'vernacular' everywhere. In Massachusetts, many municipalities are increasingly adopting this concept. Boston is now on the national forefront of "green building" with the adoption of Article 37 of the Boston Zoning Code. According to a recent published report by SustainLane.com, the City of Boston is now recognized as one of the top 10 "sustainable" cities in the United States in part due to Article 37. Many people have called my office inquiring about what exactly "sustainability" and "green building" mean, especially in the context of this new Article 37.

The first thing to know about "green building" is the importance of including legal and design professionals from the start to ensure that all parties clearly understand, as with any project, the goals for the project, the potential issues and the obligations of each party. This is especially true for the emerging green building concepts and the unspoken expectations of these concepts, which can become a source of claims or disputes during the project and beyond.

Article 37 codifies "green building" as a part of the development process in Boston. The Boston Zoning Commission adopted Article 37 last year as part of Mayor Menino's Sustainable Development initiative. In short, projects of a certain size in Boston must be designed in a way that

Continued "Greening" Page 2

Lender Alert: Appeals Court Decision Subordinates Lender's Interest to Cost for Abating Code Violations in Unoccupied Foreclosed Residential Property

Board up companies servicing foreclosed buildings are reporting a significant growth in business, however any lender who becomes a landlord for any foreclosed residential property should not make the mistake of thinking boarding up the windows and hoping for a quick sale is the proper course of action.

Failing to properly maintain a foreclosed residential property will cause any lender turned landlord to further loose value in the mortgaged property after the recent Appeals Court decision in *City of Boston v. Rochalska*. The decision expanded the applicability of statutory language in G.L. c. 111 § 127I, which authorizes the appointment of a receiver to remedy substandard conditions on residential property. Any lender turned landlord should pay careful attention to this decision because the costs incurred by a receiver become a 'superlien' against the mortgaged property – superior to any mortgage interest, even those recorded previous in time.

The Appeals Court decision expanded the power under this statue by upholding the City of Boston's application of G.L. c. 111 § 127I to unoccupied residential dwellings by holding that the statutory language, "…in the best interest of occupants residing in the property" also applies to residents occupying a building that abuts residential dwellings with uncorrected sanitary and other code violations.

The costs incurred by a receiver, including the receiver's hourly billable rate, in returning a residential property to a state of compliance with the state sanitary and other codes become

Continued "Lenders" Page 3

What Makes A Building "Green" Under the New Boston Zoning Code Article 37?

What makes a proposed project "green" under Boston Zoning Code Article 37 is primarily dictated by the proposed project's ability to obtain a certain level of what is called "LEED Certification," which is the internationally recognized standard for "green" or sustainable building. Article 37 requires a proposed project to be LEED certifiable under the "most appropriate LEED building rating system." The term "most appropriate LEED building rating system" refers to the U.S. Green Building Council's nine LEED rating systems for different types of projects. Some of the ratings systems include "New Construction," "Commercial Interiors," "Existing Buildings," "Core and Shell," and "Retail." The type of project and work involved will dictate the type of review.

The third party review will involve an analysis of the proposed project's design based upon the five design categories incorporated into the nine LEED building rating systems, for example "sustainable sites" and "water efficiency" are two design categories in each building rating system. Generally, various design concepts organized by these five design categories provide one credit toward the required "LEED Certification." Meeting the prerequisites required under the applicable LEED rating system and achieving an aggregate number of credits under the applicable LEED rating system determines which of the four different certification levels, "certified," "silver," "gold" or "platinum," the proposed project can achieve. A building, for example, in the "new construction" building rating system category that meets the applicable prerequisites and obtains at least 23 credits will obtain "certified" status. The more credits obtained, the higher the certification level.

> **"Article 37 requires a proposed project to be LEED certifiable under the 'most appropriate LEED building rating system.'"**

Some examples of design concepts that can earn a project "credits" under one of the five design categories found in each building rating system include, use of an existing structure for a proposed project rather than virgin land, inclusion of construction policies to mitigate dust and equipment idling, locating the project close to public transportation, providing special parking for alternative fuel vehicles and/or bicycle racks. Under Article 37, a maximum of four (4) credits toward certification can be obtained by incorporating concepts identified in Appendix A to Article 37.

So who determines how many credits your project can earn? As part of the Article 37 review process, a review must be performed by the LEED certified professional "and/or other recognized expert by the Boston Redevelopment Authority" to determine how many credits your project may merit. The certified review performed by this professional will detail the credits a proposed project may earn. The certified review is then submitted to the Boston Redevelopment Authority, where it will then be submitted within five days to the Boston Interagency Green Building Committee for review and approval.

179 Lincoln Street in Boston is one project recently approved under the new Article 37 requirements.

Greening Continued...

Continued from Page 1

merits LEED Certification under the applicable building review system established by the U.S. Green Building Council. Buildings that incorporate "green building" concepts can be more efficient and cost effective to operate and also, may provide some public relations value to the owners and/or tenants. Working closely with attorneys and design professionals from the outset of the development process is key to successfully achieving the certification now required by zoning law.

Applicability of "Green Building"

A proposed project is only subject to the requirements of Article 37 if the proposed project is also subject to "Large Project Review" pursuant to Article 80B of the Boston Zoning Code. The applicability of Large Project Review is set forth in Section 80B-2 of the Boston Zoning Code and varies, generally, based upon where the project is located, the square footage of the project and what the project proposes - changing or expanding a use, new construction or reuse of an existing building. The general square footage thresholds that trigger the applicability of Article 80B are 50,000 and 100,000 square feet of gross floor area, depending on the project and its location. Developers should also note that in limited instances, Large Project Review may be waived; and therefore, the question presented is whether or not that Article 37 compliance would also be waived. The answer is most likely no. A Large Project Review waiver does not eliminate the fact that Article 37 compliance is dictated by the applicability of Article 80B to a proposed project not whether the review is actually performed. Further, if a project is not subject to Article 80B, but the developer elects to comply with its provisions anyway, the project developer is also electing to comply with Article 37 as well.

Certain projects are exempt from Article 37 compliance based upon when a proposed project began seeking its regulatory approvals. If, prior to the first notice of a hearing before the Zoning Commission regarding the adoption of Article 37, a proposed project had filed an application for a building or use permit or an appeal for zoning relief (provided that the relief is subsequently granted) then the project is exempt from complying with Article 37. A proposed project with an application filed with the Boston Redevelopment Authority for approval of a Development Impact Project plan or Planned Development Area prior to the first notice of a hearing is also exempt, provided that the respective application is subsequently approved.

Zoning Alert: High Court Curbs Overbuilding on Undersized Lots

A home owner proposed to substantially increase the living space of his home on an existing undersized lot. Although the proposal would have complied with the dimensional requirements of the local zoning bylaw, the town turned it down because the subsequently enacted zoning by-law prohibited increasing the living space of homes on existing undersized lots. Previously one and two family homes had enjoyed the protection afforded them by the second exempt clause of G.L. c. 40A, §6. The clause permits owners of non-conforming lots to extend the living space of their homes on the condition that the proposed extension "does not increase the nonconforming nature" of the existing home. In ruling in favor of the town the Court held that because the trend to expand or "mansionize" existing homes on undersized lots has the practical effect of decreasing the availability of starter homes in the community, towns have a legitimate need to protect against such mansionizations and limit the scope of improvements to smaller projects such as scaled down dormers and porches. *Bjorklund v. Zoning Bd. of Appeals of Norwell.* □

Lenders Continued...

Continued from Page 1

a lien against the property superior to any interest, except government liens filed previous in time. The receiver's costs are a 'superlien' that must be paid with the proceeds from any sale or auction of the subject property before the lender is paid.

While the appointment of a receiver pursuant to G.L. c. 111 § 127I is generally for unabated violations of the state sanitary code, a party with standing may petition the court for the appointment of a receiver to abate sanitary and all other violations on the property, including fire, building, zoning or other issues where the property is a "public nuisance." The Court has broad discretion when it comes to appointing a receiver where the landlord has demonstrated an unwillingness or inability to abate orders to correct code violations and the appointment "would be in the best interest of the occupants."

The big issue in this case is not only the "superlien" status granted to the costs incurred by the receiver, it is also the fact that a receiver may now be appointed by the court for unoccupied residential buildings. Previously, it was believed by many in the real estate community that this form of relief was available, under G.L. c. 111 § 127I, only for occupied buildings because of the statutory language "in the best interest of the occupants." No longer. The Court reasoned that the legislative intent of G.L. c. 111 § 127I shows its reasonable applicability to the occupants of a building abutting a substandard property, even if the substandard property itself has no occupants. When I was the Commissioner of the Inspection Services Department in Boston, I saw a number of situations in which the receivership statute was properly and broadly applied to abate violations and in circumstances where property owners could have avoided the appointment of a receiver by working cooperatively to address outstanding violations. The appointment of a receiver was seen by the court as a last resort remedy to compel compliance. In fact the Chief Justice of the Boston Housing Court, the Honorable Manuel Kyriakakis often presided over these cases himself to ensure for the proper application of this form of relief.

As for lenders faced with managing foreclosed property, municipalities are seeking ways to ensure unoccupied foreclosed properties do not become a problem in the neighborhoods in an already difficult real estate market. The Court's decision here now provides municipalities with an extremely strong tool to accomplish that goal. Lenders must take particular care to ensure properties remain compliant and that there is an appropriate response to abate violations before the court appoints someone to do it for them. Maintaining these properties and addressing non-compliance enforcement issues are time consuming, confusing and expensive. Lenders should consult legal or other real estate professionals to make sure their interests are properly protected. See, *City of Boston v. Rochalska.* □

Developer Awarded Attorney's Fees for Defending Municipal Prosecution of Wetlands Violations Already Addressed with State Officials

Real estate professionals at times encounter conflicting direction from state and local officials. Therefore, industry professionals should take note of a recent Appeals Court decision upholding the award of $56,000 in attorney's fees incurred by a real estate developer faced with a lawsuit filed by a municipal conservation commission (the "Con Comm") seeking to compel the developer's compliance with the Con Comm's enforcement orders for state wetlands violations. The lawsuit's claims were held to be "insubstantial, frivolous and not advanced in good faith" pursuant to G.L. c. 214 § 7A where the defendant-developer was already bound by an Administrative Consent Order with state DEP officials addressing the same violations. The Consent Order, by statute, relieved the developer of any obligation to comply with the Con Comm's enforcement orders. The Court reasoned that the Con Comm's knowledge of the Consent Order before filing its litigation demonstrated a lack of good faith and the insubstantiality of the claims.

Professionals should remember this decision when working under regulatory schemes administered by both state and local officials, such as the state building, fire protection and sanitary codes. State pre-emption can mean that only 'one master' needs to be served, but not without exceptions, independent legal advice should always be sought when faced with these issues. *SBT Holdings v. Westminster Conservation Commission.* □

Got Financing?
The BRA may want to know if your real estate development project is financially viable

A number of people have asked me about the recent buzz among industry professionals and the media regarding a new regulation allegedly requiring financing as a pre-requisite for real estate development approvals. The genesis of the regulation is the well founded concern that the credit crisis will leave many development projects in Boston nothing more than big holes in the ground; however, any such regulation must be well balanced against the financing process for development projects. As I have been telling those who have called my office, the Boston Redevelopment Authority ("BRA"), at this early stage in its process, is working to find that proper balance.

The first important thing to know is that the regulation is still in a policy development phase. It has not yet been submitted to the BRA's board of directors for consideration and approval. Generally, once there is some formal written policy paper or regulation for consideration, a comment period may be provided so public input can be added to this process.

Second, despite the rumors, the proposed regulation is not intended to require 100 percent financing to be in place before a permit can be issued. This fact has been an issue of concern for many people calling my office, especially where many real estate projects cannot obtain permanent financing until the project has been issued a building permit. Many developers, general contractors and others would be required to use 'out of pocket' cash or bridge loans to comply with a regulation requiring a showing of 100 percent financing before a permit is issued. Another important consideration is the proposed regulation's impact on the standard representations and obligations often included in the many contractual templates used for the agreements between 'Owners' and 'Construction Managers' and/or 'General Contractors.' The inability to obtain permits could be a source of delay claims where the work cannot move forward in accordance with the project schedule because the Owner has yet to obtain 100 percent financing, and therefore, placed the building permit under which work is authorized to proceed in jeopardy.

The BRA understands the vital role regulatory approvals play in obtaining project financing. The regulation now in development will balance the need to support development during this difficult financial time with the well reasoned objective of ensuring that the city's landscape does not become marred with abandoned development projects. While nothing is final yet with regard to the proposed regulation, it potentially could require financing to be in place within a certain amount of time after the permit for a project issues, and/or require a disclosure or evaluation of financing as part of the development approval process. Such financial disclosures are at times required between Owners and Contractors anyway under the terms of the agreements between such parties.

If you have any questions or have an interest in developing a discussion group to add effective input to this process, please contact me at my office. This issue has raised questions, and rightly so, but the important take home message is that the BRA has always understood the importance of supporting development projects in Boston, especially during this time. □

"Green Buildings" LEED Certification: Don't Forget State Building Code Compliance Requirements

While achieving "green building" compliance under the Boston Zoning Code is one thing, compliance with the requirements of the Massachusetts State Building Code is another requirement for every proposed project. Developers must be aware that the concept of "green building" has also taken hold in the building code. The new 7th Edition of the Massachusetts State Building Code, which became effective October 1, 2008, includes new energy provisions developed through the State Board of Building Regulation and Standards' Energy Advisory Committee. Essentially, the new code adopts the International Energy Conservation Code along with stricter energy efficient provisions. Developers seeking LEED certification must make sure that the energy efficient features they propose for their projects comply with the building code's standards for design, materials and process. □

3 Minutes on Permits ©

Kevin J. Joyce, ESQ.
Commercial, Environmental, & Historic Permitting, Zoning & Civil Litigation

Doherty Law Offices
50 Franklin Street
Boston, MA 02110

Phone: 617-542-8905
Fax: 617-542-6479
Email: kjj@dohertylawoffices.net

www.PermitLawyer.com