From: Robert Annese <law@robertannese.com>
Date: March 1, 2021 at 12:05:37 PM EST
To: Jennifer Raitt <jraitt@town.arlington.ma.us>
Subject: Town Meeting Warrant Articles 39 and 40

Dear Jenny:

I would like to offer some comments both with respect to Article 39 and 40, which are two of the warrant articles which will be on the agenda at the 2021 Annual Town Meeting.

As I have stated previously, the provisions of Section 3.4.4, i.e. the "Environmental Design Review Standards" contained in the Zoning Bylaw include the following language:

"The standards are intended to provide a frame of reference for the applicant in the development of site and building plans as well as a method of review for the reviewing authority. They shall not be regarded as inflexible requirements and they are not intended to discourage creativity, invention, and innovation."

The section then goes on to describe various standards, (subsection A. through I.) which essentially encompass the overall standards the members of the ARB are to apply when considering an application for development filed under the "Environmental Design Review" portion of the Zoning Bylaw.

The language of both Article 39 and 40 would negate the exercise of flexibility, creativity, invention and innovation as called for by the provisions of Section 3.4.4 and frustrate any efforts on the part of ARB to utilize any of those considerations with respect to their deliberations regarding an application for development which comes within the jurisdiction of the ARB.

If that is the case, then the question would arise as to why there is even a need for the ARB if the ARB is prohibited in any particular zoning district from exercising the discretion granted in Section 3.4.4 with respect to development projects under the review of the ARB both with respect to “Environmental Design Review Standards” and the “Mixed-Use” provisions of the Zoning Bylaw.

The ARB would not be necessary if that body is to perform the same duties as the Zoning Board Appeal without the ability on the part of the members of the ARB to exercise discretion in accordance with Section 3.4.4.

Any reviews by the ARB under the “Mixed-Use” bylaw would be severely constrained if there was no discretion to be creative, innovative and inventive in applying the terms of the bylaw.

The proposed language of Article 40 would limit the incentive for even small contractors to purchase a commercial property, maintain a commercial use of the property under the “Mixed-Use” bylaw yet be prohibited from adding a residential unit in the building even if the residential unit becomes the predominate use of the building.

A private development can only occur when a private individual or entity decides to spend money to develop real estate.

Why would any individual or entity want to do that if they were limited in adding to or expanding the commercial property they were purchasing because of a requirement that any added or expanded use or unit be for affordable housing?

The Land Court Decision in the so-called "Hotel" case, i.e. Miscellaneous Case No. 20 MISC000378 (RBF) decided by a Land Court Judge on December 8, 2020, where the plaintiffs in that case attempted to have the Court decide that comments made at Town Meeting by the Chair of the ARB somehow bind the ARB to not have the ability to exercise discretion with respect to "Mixed-Use" developments does not serve as a basis for concluding the that the members of ARB cannot exercise the authority they have been given under the provisions of Section 3.4.4

In that case, the Court went on to say, within the substance of the Decision, "these are statements made before a legislative body in debate; it is questionable whether it is reasonable to rely on such statements. Moreover, Massachusetts courts have consistently dismissed an application of estoppel against public entities, finding that the reliance of the party seeking the benefit of the doctrine was unreasonable as a matter of law. The SJC has been "reluctant to apply principles of estoppel to public entities where to do so would negate requirements of law intended to protect the public interest."

"[w]e have been cited to no case (and have found none) where either the late filing of the appeal or the late filing of the notice of appeal in the town clerk's office has been excused by applying the principals of estoppel."

The Court went on to say that "no Court has ever stated that there are no circumstances whatsoever under which a municipality could be estopped. If that were the only question, the claim for equitable estoppel might go forward."

That language was not relevant to the determination made by the Land Court Judge that the plaintiffs' complaint was to be dismissed because the dismissal occurred because of the failure by the plaintiffs to not comply with the procedural requirements of G.L. c. 40A, §17 by not filing a notice of the complaint within the 20-day appeal, as required with the Town Clerk's Office.

Contrary to arguments that have been put forth that "the doctrine of equitable estoppel" could be used to somehow limit the ability on the part of the members of the ARB to exercise discretion, statements made by the Court in the decision clearly state that there is no legal precedent that can be relied upon whether statutory, case law or otherwise which could emasculate the authority of the members of the ARB to follow the provisions of Section 3.4.4 in any project coming before the body.

Even if the portion of plaintiffs complaint alleging equitable estoppel were allowed to go forward there is not even a hint by the Judge in the case and any provisions of law that such a theory would pass muster with the Courts.

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