



nerej

Can traditional zoned commercial/industrial areas coexist with mixed-use and Chapter 40B projects

January 30, 2014 - Spotlights

Commercial developers and tenants take comfort in knowing that traditional zoning will offer a buffer or other clear division between commercial and residential uses. Established commercial developments are historically zoned away from residential neighborhoods. The operators of commercial properties go about their business without fear of complaints or lawsuits from nearby residents seeking to curtail or enjoin what they perceive as noxious commercial uses. Oftentimes, pre-existing commercial uses in residential neighborhoods draw the ire of nearby residents who protest traffic, noise and even odor generated by commercial properties that are necessarily more invasive than surrounding homes.

While traditional zoning can plan for and balance this dynamic in an effort to foster and protect commercial development necessary for economic growth, the application of modern land-use principles has recently been cause for concern among commercial property owners. The concept of sustainable land-use planning, embraced by LEED, Smart Growth and various other sustainability standards, incorporates the idea of "mixed-use" and "in-fill" development. These concepts, when combined with a regional need for affordable housing that has led to a preference for residential development, have brought homes in close proximity to businesses. Mixed-use development works with careful planning and foresight; however, a recent case in Massachusetts has highlighted the friction created by a proposed residential in-fill development in an established industrial area.

Shattuck Road Industrial Park in Andover is not unlike any other commercial or industrial park in the region. Planned in the 1950s and developed in the 1980s and 1990s, the area is zoned industrial; therefore, consistent with traditional zoning, residential uses are prohibited. Shattuck Industrial Park is now home to major employers such as Putnam Investments, Verizon, Phillips Medical Systems, MKS Instruments and Eisai, Inc., a Japanese pharmaceutical research and development company. These businesses use the park for everything from general office space, to R&D, to on-site manufacturing. The restrictive industrial zoning in this area has been a selling point for the park and by all accounts lessees are willing to pay higher rent because they have confidence in the long-term zoning integrity of the site, which translates into great tax revenue for the community. The park has been a huge success. While there were originally ten lots, one lot was subdivided in 1997 and one-half of that lot remains undeveloped and is the only vacancy in the cul-de-sac. The remaining lots were developed in compliance with the zoning requirements for the industrial district.

Enter Massachusetts' comprehensive permit law, Chapter 40B, which generally allows residential developers to bypass local zoning controls if they provide for a certain percentage of affordable housing within the residential development. Chapter 40B is premised on the regional need for housing and reflects the preference for residential development, so long as it is consistent with smart growth principles. While the siting of apartment homes in the middle of an established

industrial park arguably constitutes mixed-use and in-fill development, the businesses already located there shuddered at the thought of co-existing with residences and vigorously denied the sustainability of this arrangement over the long-term. Some businesses in the park even threatened to move out if the apartments were built. The Housing Appeals Committee, an administrative agency charged with reviewing comprehensive permit appeals, approved the residential development after considering Andover's master plan and balancing the regional need for affordable housing against the local need for an exclusive industrial zone. Although the Committee recognized that Andover had a valid interest in preserving the integrity of its industrial zone, the strong regional preference for residential development appears to have won out, at least at this initial stage of appeal.

Given the current preference for housing and the flexibility of regional planning laws such as Massachusetts' Chapter 40B, those analyzing the sustainability of any particular zoning scheme should look beyond basic zoning codes. Investigation of the underlying municipal plan and its implementation is important to determine whether compelling efforts have been made to provide for multi-family housing in order to override allegations of exclusionary zoning and protect the integrity of commercial districts. The creation of multi-family zoning districts or Smart Growth Zoning Overlay Districts under Chapter 40R in Massachusetts constitutes strong evidence that local planners are working to create housing. In fact, Chapter 40B permits and approvals have been denied in other towns that have taken steps to create multi-family districts. Communities intent on maintaining local control are therefore well-advised to adopt multi-family overlay districts, such as Chapter 40R in Massachusetts. Until the housing market reaches equilibrium, commercial property stakeholders and homeowners may become strange bedfellows if the integrity of commercial zoning is compromised in an effort to build housing in the region.

Michael Rosen, Esq. is a partner in the corporate and business law group; Christopher Agostino, Esq. is an associate in the corporate and business law group, both with Ruberto, Israel & Weiner, P.C., Boston.