SUPREME JUDICIAL COURT

135 WELLS AVENUE, LLC vs. HOUSING APPEALS COMMITTEE & others [1]

Docket:	SJC-12253
Dates:	April 6, 2017 - November 13, 2017
Present:	Gants, C.J., Lenk, Hines, Gaziano, Lowy, Budd, & Cypher, JJ. [2]
County:	Suffolk
Keywords:	Municipal Corporations, Property, Use of municipal property. Real Property, Deed, Restrictions. Housing. Zoning, Housing appeals committee, Low and moderate income housing, Board of appeals: jurisdiction. Permit.

Civil action commenced in the Land Court Department on January 14, 2016.

The case was heard by Robert B. Foster, J., on motions for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

Daniel P. Dain for the plaintiff.

Maura E. O'Keefe, Assistant City Solicitor (Jonah Temple, Assistant City Solicitor, also present) for zoning board of appeals of Newton & another.

Pierce O. Cray, Assistant Attorney General, for Housing Appeals Committee.

Paul E. Bouton, Stephen P. LaRose, & Christopher R. Minue, for Citizens' Housing and Planning Association, amicus curiae, submitted a brief.

GAZIANO, J. The plaintiff, 135 Wells Avenue, LLC (135 Wells), owns a 6.3-acre parcel of land in Newton (site), in an area known as Wells Avenue Office Park (property), which is zoned for limited manufacturing use. As is all of the property, the site is subject to a restrictive covenant owned by the city of Newton (city); among other things, the city's deed restriction permits only certain of the uses ordinarily allowed in a limited manufacturing zone, limits the size and setbacks of buildings, and requires that a certain portion of the land remain open

space. The city also owns an abutting 30.5-acre parcel with a deed restriction requiring that it be used only for conservation, parkland, or recreational use.

135 Wells seeks to construct a 334-unit residential rental unit complex on the site, with eighty-four of the units (twenty-five per cent) reserved as affordable housing, pursuant to G. L. c. 40B, §§ 20-23. In order to proceed with development of the project, in May, 2014, 135 Wells asked the city's board of aldermen (aldermen) to amend the deed restriction to allow a residential use at the site, and to permit construction in the nonbuild zone; the aldermen declined to modify the deed restriction. At the same time, 135 Wells applied to the city's zoning board of appeals (ZBA) [3] for a comprehensive permit to develop the mixed-income project. The ZBA denied the permit application, on the ground that it lacked authority under G. L. c. 40B, § 21, to amend the deed restriction, an interest in land held by the city. 135 Wells appealed from the ZBA's decision to the housing appeals committee of the Department of Housing and Community Development (HAC). The HAC affirmed the ZBA's decision that the ZBA lacked authority to amend the deed restriction. 135 Wells then sought judicial review of the HAC's decision, pursuant to G. L. c. 30A, in the Land Court. A judge of that court denied the motion of 135 Wells for judgment on the pleadings and allowed the defendants' cross motions; in doing so, he noted that this court had confirmed more than fifty years previously that the city's deed restriction is a valid property interest, granted to it by a private land holder, and properly recorded at the registry of deeds. See Sylvania Elec. Prods. Inc. v. Newton, 344 Mass. 428, 430 (1962) (Sylvania). The judge also concluded, as had the HAC, that Zoning Bd. of Appeals of Groton v. Housing Appeals Comm., 451 Mass. 35 (2008) (Groton) was controlling, and that the HAC does not have authority under G. L c. 40B to order the city to relinquish its property interest.

135 Wells appealed to the Appeals Court and also sought direct appellate review; we allowed the application for direct appellate review. On appeal, 135 Wells argues that we should conclude that the negative easement is not a property interest in land; revise our holding in Groton and conclude that the HAC does have authority to modify certain types of property interests in land; or, in the alternative, determine that the purposes for which the restrictive covenant was enacted are now incapable of being attained, and, consequently, that the restrictive covenant should be declared null and void.

We decline each of these suggestions and affirm the judge's decision granting judgment on the pleadings to the defendants. [4]

1. Facts and prior proceedings. In support of their cross motions for judgment on the pleadings, the parties filed stipulations of fact, and also relied upon the facts set forth in Sylvania. The parties agreed that there were no material facts in dispute and that judgment as a matter of law was appropriate. We recite the facts based on the judge's decision and the undisputed facts in the record.

In 1960, Sylvania Electric Products (Sylvania Electric) held an option to purchase a 180-acre parcel of land in the city on which it intended to build a manufacturing plant. Sylvania Electric petitioned the aldermen to reclassify a portion of the property from residential use to a limited manufacturing zoning district. Under the proposed arrangement, the city would obtain an option

to purchase a 30.5-acre portion of the 180-acre parcel, which would be benefited by use restrictions on the remaining 153.6-acre servient estate. The aldermen approved the zoning reclassification -- rezoning the parcel from residential to limited manufacturing use -- and authorized the mayor to purchase the option to buy the 30.5-acre dominant estate. [5]

In 1969, the city exercised its option to purchase the 30.5-acre parcel, and, on May 27, 1969, recorded the deed from Sylvania Electric's successor in interest at the registry of deeds. The deed refers to the 30.5-acre dominant estate purchased by the city as "[p]arcel 2," and the remaining 123.1-acre servient estate as "[p]arcel 1." The deed states that the restrictions it sets forth are "appurtenant to . . . the granted premises [the city's dominant parcel 2]," [6] and "are hereby imposed on the adjoining . . . [servient] [p]arcel 1." The deed also provides that the restrictions "shall continue in force for a period of ninety-nine (99) years from December 1, 1968." [7] As described by the judge, the deed restrictions include provisions "limiting the floor area of buildings to be constructed on the premises; requiring that a percentage of the ground area be maintained in open space not occupied by buildings, parking areas or roadways; imposing setbacks, height restrictions, and a buffer zone; restricting the number and type of signs and the type of lighting; and limiting the use of buildings to certain, but not all, of the uses permitted in a limited manufacturing district." The deed further provides, "No building or structure shall be erected on said [p]arcel 1, or on any one subparcel or group of subparcels constituting [p]arcel 1, without the prior approval of the . . . [a]ldermen with respect to the following specific items: finished grading and topography, drainage, parking, and landscaping."

Sylvania Electric ultimately decided not to locate its plant in the city. From 1971 to 2014, a number of entities purchased portions of parcel 1 from successor private owners. Some of these purchasers sought amendments to the deed restrictions from the aldermen, as the elected representatives of the city, to permit uses other than the explicitly authorized subset of limited manufacturing uses allowed in the deed restrictions. During that time, the aldermen approved approximately twenty amendments to the deed restrictions, allowing uses such as a retail store and food service area, secular and religious schools, medical offices and a physical rehabilitation center, tennis courts, a health club, a dance school, a gymnastics academy, a day care center, a "bouncy house," and a skating rink. None of these amendments authorized a modification for residential development.

In 2014, 135 Wells purchased a 6.3-acre subparcel of parcel 1; at the time of purchase, the parcel was located in a limited manufacturing zoning district and was subject to the restrictive covenant, which, among other things, precluded any residential use. In May, 2014, 135 Wells sought a modification, waiver, or release of the deed restriction from the aldermen, to permit a residential use and to allow development in the no-build zone. It also filed an application with the ZBA for a comprehensive permit under G. L. c. 40B to build a 334-unit residential rental complex, with eighty-four of those units to be affordable housing. In its G. L. c. 40B application, 135 Wells requested that the ZBA "waive" the deed restrictions and permit this residential use. In November, 2014, the aldermen denied the petition for an amendment to the deed restrictions. In January, 2015, the ZBA ruled that it lacked authority under G. L. c. 40B to waive or modify the deed restrictions.

135 Wells appealed to the HAC. The HAC determined after a hearing that "the deed restriction conveyed to the [c]ity . . . is not a requirement or regulation for the purposes of G. L. c. 40B, § 20, and the waiver or amendment sought by the developer is not a permit or approval under G. L. c. 40B, § 21." Accordingly, the HAC affirmed the ZBA's determination that it lacked authority to amend the deed restriction.

In January, 2016, 135 Wells sought review of the HAC's decision in the Land Court, pursuant to G. L. c. 30A, § 14. It argued, first, that G. L. c. 40B provided the ZBA the authority to allow the requested amendment; second, that the aldermen's actions in allowing the amendments to the deed restrictions were functionally equivalent to the permitting decisions issued by the ZBA, and should be recognized as such rather than as modifications of interests in land; and, third, that the existing uses of the parcel and its condition were so drastically different from what originally was intended that the purpose of the deed restrictions could not be achieved, and thus that the restrictive covenant was no longer enforceable.

After the parties agreed that all material facts necessary to resolution of the matter were not in dispute, and that judgment as a matter of law was appropriate, the parties filed cross motions for judgment on the pleadings, on the legal question whether the ZBA or the HAC had authority under G. L. c. 40B to amend the deed restrictions. The judge determined that neither the ZBA nor the HAC had authority under G. L. c. 40B to require the city to amend the deed restriction so as to allow the requested residential use. As had the HAC, the judge declined to revisit the conclusion in Sylvania that the deed restriction is a valid property interest owned by the city. After thoroughly reviewing the current uses, the judge concluded also that the restrictive covenant continued to benefit the city and remained enforceable because parcel 1 continued to be an exclusively commercial property, with designated open space and a number of protections, including a buffer zone, between the developed area and the Charles River.

2. Discussion. Decisions of the HAC are reviewed "in accordance with the provisions of [G. L. c. 30A, § 14 (5),(6)]." G. L. c. 40B, § 22.

In order to place 135 Wells's claims in context, we briefly review the purposes underlying the Legislature's addition of the affordable housing act to G. L. c. 40B. In October, 1969, the Legislature adopted "An Act providing for the construction of low or moderate income housing in cities and towns in which local restrictions hamper such construction," adding four new sections to G. L. c. 40B. [8] See St. 1969, c. 774. The affordable housing act was intended to address the affordable housing crisis in much of Massachusetts, see Zoning Bd. of Appeals of Lunenburg v. Housing Appeals Comm., 464 Mass. 38, 39-40 (2013) (Lunenburg), by ensuring that local municipalities did not make use of their zoning powers to "exclude low and moderate income groups," see Board of Appeals of Hanover v. Housing Appeals Comm., 363 Mass. 339, 347 (1973) (Hanover), and by simplifying the process by which a developer may obtain approval of an affordable housing project through a unified permitting process. See Lunenburg, supra at 40-41.

After the 1969 amendments to G. L. c. 40B, a developer who seeks to build a housing development that contains at least twenty-five per cent affordable housing (intended for those earning less than eighty per cent of the medium income in the area) may apply directly to the

zoning board of appeals of a local municipality for a "comprehensive permit," rather than applying to each individual agency that typically would have control over some subset of the necessary permits. See G. L. c. 40B § 21; Dennis Hous. Corp. v. Zoning Bd. of Appeals of Dennis, 439 Mass. 71, 76-77 (2003). The municipality's zoning board of appeals, in turn, has authority to review the application in its entirety, to override local requirements or regulations, and to issue "permits or approvals" to the same extent, and with the same authority, as any of those local agencies. Id. at 76-77.

We have addressed the affordable housing act requirements under G. L. c. 40B in a number of decisions in the intervening years, see, e.g., Lunenburg, 464 Mass. at 39-44; Standerwick v. Zoning Bd. of Appeals of Andover, 447 Mass. 20, 28-29 (2006) (Standerwick); Hanover, 363 Mass. at 346-347, but we have not previously been squarely confronted with a case involving a municipally-owned negative easement.

The provisions in G. L. c. 40B allowing a local zoning board to issue "permits or approvals," and to dispense with certain "requirements or regulations," enable a zoning board of appeals to issue the types of authorizations usually issued by local agencies. This authority is intended to simplify the application process and to ensure that local obstacles are not put in place, thus enabling more affordable housing projects to be completed. Standerwick, supra ("We have long recognized that the Legislature's intent in enacting G. L. c. 40B, §§ 20-23, is to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing in the Commonwealth" [quotations omitted]).

We have emphasized that the power to issue "permits or approvals" and to dispense with "requirements or regulations" is broader than merely the power to issue zoning variances. See Board of Appeals of Maynard v. Housing Appeals Comm., 370 Mass. 64, 67-69 (1976) (Maynard). For instance, in Maynard, we stated that the HAC could dispense with a town's requirement that a developer perform its agreement to extend a sewer line to an affordable housing development, pursuant to its power to dispense with "requirements or regulations" under G L. c. 40B. Maynard, supra at 68-69. More generally, we have applied a functional definition to the phrase "permits or approvals." See Zoning Bd. of Appeals of Sunderland v. Sugarbush Meadow, LLC, 464 Mass. 166, 188 n.3 (2013) (Sunderland). We have said that "permits or approvals" are the authorizations given out by local permitting agencies, and the types of permissions that these agencies typically grant. See Zoning Bd. of Appeals of Amesbury v. Housing Appeals Comm., 457 Mass. 748, 755-756 (2010) (Amesbury); Groton, 451 Mass. at 40.

a. The ZBA's authority to amend the restrictive covenant. 135 Wells maintains that the amendment it seeks is the functional equivalent of a "permit[] or approval[]" within the meaning of G. L. c. 40B, and not a modification of a property interest. It contends that the ordinary dictionary meanings of the words "permit or approval" include modifications and amendments, and this definition must be applicable with respect to the requested amendment of the restrictive covenant at issue here. It contends also that the process established by the aldermen for authorizing amendments to the restrictive covenant is the functional equivalent of the process used by the ZBA for issuing permits or approvals under the zoning power, such that there is no distinction between them, and the ZBA is authorized to modify the deed restrictions in the same manner as it may issue permits and approvals. In addition, 135 Wells suggests that the recorded

deed restrictions, which were determined to be a valid property interest held by the city in 1962, see Sylvania, 344 Mass. at 435-436, are not in fact a legitimate property interest, but, rather, merely zoning restrictions.

General Laws c. 40B, § 21, provides in relevant part:

"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."

135 Wells maintains that the meaning of the phrase "permits or approvals" encompasses modification to a restrictive covenant. 135 Wells bases this argument on dictionary definitions of the words "permit" ("a written warrant or license"), Webster's Third New International Dictionary 1683 (1961), and "approval" ("the act of approving"), id. at 106. It then argues that the phrase "permits or approvals," in this context, includes within its ambit amendments to a restrictive covenant where, as here, the provisions in the restrictive covenant are similar to those applicable to a zoning decision, and the processes followed by the ZBA and the aldermen in making decisions under both G. L. c. 40B § 21, and G. L. c. 40, § 3, are similar. 135 Wells maintains also that there are distinct differences in kind between a property interest that is an affirmative easement and a property interest that is a negative easement, and thus that this court's jurisprudence relative to the authority of a zoning board of appeals with respect to positive easements is inapplicable to negative easements. We are not persuaded.

In interpreting a statute, we begin with its plain language, as the best indication of legislative intent. Sullivan v. Brookline, 435 Mass. 353, 360 (2001). We interpret particular language within a statutory provision with respect to the statute as a whole. Commonwealth v. Scott, 464 Mass. 355, 358 (2013). Where a term is not defined in a statute, "the dictionary definition is helpful, but it should not be dispositive." Oxford v. Oxford Water Co., 391 Mass. 581, 587 (1984).

As 135 Wells contends, the authority of a zoning board of appeals under G. L. c. 40B is broad. See Amesbury, 457 Mass. at 755-758. When acting pursuant to its authority granted by G. L. c. 40B, a zoning board of appeals "has the same scope of authority as any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen. . . In other words, . . . the power of [a zoning board of appeals] derives from, and is generally no greater than, that collectively possessed by these other bodies." (Citations omitted.) Id. at 756. The extent of this authority does not, however, attain the level that 135 Wells ascribes to the ZBA when it issues permits or approvals pursuant to G. L. c. 40B, § 21.

While 135 Wells relies upon dictionary definitions for the meaning of the terms "permits or approvals" under G. L. c. 40B, there is little reason to turn to dictionary definitions in

interpreting the statutory language here, as the language of G. L. c. 40B § 21, itself defines the term "permits or approvals" in several respects. The statute first delineates the types of local agencies that may grant permits or approvals (i.e., "local board[s] or official[s]"), and then enumerates the types of authorizations that fall within the statutory meaning of permits or approvals, (e.g., "conditions and requirements with respect to height, site plan, size or shape, or building materials").

This court previously has interpreted the statutory phrase "permits or approvals" in the same manner, noting the types of local agencies that may grant permits or approvals, and enumerating the types of authorizations that fall within the category of permits or approvals. Groton, 451 Mass. at 40. We have considered the phrase "permit or approval" in G. L. c. 40B, § 21, with reference to the type of authorization given, concluding that it "refers to building permits and other approvals typically given . . . by . . . separate local agencies." Groton, supra. Examples of permits or approvals include "action typically required by local permitting authorities with respect to 'height, site plan, size or shape, or building materials.'" Id., citing G. L. c. 40B, § 21. See Sunderland, 464 Mass. at 181-183 (G. L. c. 40B, § 21, grants zoning board authority to issue permits that fire chief ordinarily would issue, such as allowing building to be constructed higher than town fire department can reach with its highest ladder truck). We also have determined that "permits or approvals" under the affordable housing act are not limited to such zoning-related actions. See Maynard, 370 Mass. at 68-69 (HAC could dispense with, as requirement or regulation not consistent with local needs, performance of developer's agreement to extend public sewer line as condition of permit). In sum, we have applied a functional definition to the term "permits or approvals." See Sunderland, supra; Amesbury, 457 Mass. at 756-757; Groton, 451 Mass. at 40. We have said that permits or approvals are authorizations given out by local permitting agencies, and the types of permissions that these agencies typically grant. See Groton, supra.

Although 135 Wells attempts to distinguish Groton, 451 Mass. at 39, and maintains the case would be applicable to these facts only if it were significantly extended, we agree with the judge's conclusion that Groton is controlling here. In that case, we considered whether, under its G. L. c. 40B authority to grant "permits or approvals," a local zoning board of appeals (board) had authority to modify a municipal property right, and to require the town to grant the developer of a proposed low income housing project an easement to travel over land owned by the town in order to access the proposed development. Id. at 36-39. The board had concluded that the project did not meet minimum safety standards because, inter alia, the driveway was partially obstructed by vegetation on land owned by the town, and because there was only one access road. Id. at 38-39. When the developer asked the town to allow it to build a second access road over the town's land and to clear the vegetation, the town refused. Id. The developer then appealed to the HAC, arguing that the easement it sought was a "permit or approval" within the meaning of G. L. c. 40B. Groton, supra at 39. The HAC vacated the board's denial, and directed the town to grant an easement over the town's property in order to construct the second access road and to remove the obstructing vegetation. Id. at 37-38.

We determined that the board could not be required to order the town to grant an easement over town land pursuant to the board's power to grant permits or approvals under G. L. c. 40B, based on the fundamental distinction between the disposition of a property right and the

allowance of a permit or approval. Groton, supra at 40-41. Allowing the board to require the town to grant an easement over municipally-owned property to a private developer would be to take away a real property right from the town, an action fundamentally different action from the types of "permits or approvals" that G. L. c. 40B authorizes a local zoning board to undertake. Id. "An order directing the conveyance of an easement . . . cannot logically or reasonably derive from, or be equated with, a local board's power to grant 'permits or approvals.'" Id. at 40, quoting G. L. c. 40B, § 20. See Reynolds v. Zoning Bd. of Appeals of Stow, 88 Mass. App. Ct. 339, 350 (2015) ("[G. L. c. 40B] has no taking component within it").

135 Wells contends nonetheless that the amendments that have been made to the restrictive covenant are the functional equivalent of permits or approvals because they are functionally the same as authorizations that have been deemed permits or approvals in other contexts, and because the process that the aldermen followed in allowing these amendments was essentially the same as the process the ZBA used in considering whether to allow permits or approvals under G. L. c. 40B. [9] 135 Wells argues that the process of applying for an amendment involves an application to the aldermen, who serve essentially as a "local board," a review procedure, and the issuance of an authorization that affects the way that land may be used, similar to the process for seeking G. L. c. 40B approval.

It is clear, however, that the aldermen's allowance of prior amendments to the restrictive covenants were not the functional equivalent of permits or approvals; the aldermen were not sitting as a local permitting authority when allowing the amendments pursuant to G. L. c. 40, § 3, and the amendments, which affected a real property interest held by the city, were not the same types of permissions as regulations concerning "building construction and design, siting, zoning, health, safety, [or] environment." [10] Amesbury, 457 Mass. at 749. See Groton, 451 Mass. at 40.

Moreover, notwithstanding 135 Wells's argument that a negative easement is somehow qualitatively different from a positive easement in terms of ownership rights, it points to no authority, and we are aware of none, that would suggest a property right to be protected from certain conditions occurring on another's land, such as building restrictions, is somehow less of a right than an easement to pass over a corner of another's property en route to one's own. See Sylvania, 344 Mass. at 430. To the contrary, we have concluded previously that both affirmative and negative easements are to be treated, equally, as easements. See Patterson v. Paul, 448 Mass. 658, 663 (2007).

Nor has 135 Wells offered any reason to support its implicit suggestion that Sylvania should be overruled because an interest in land cannot constitute a restriction such as these, that closely resemble provisions of the zoning laws. [11] Despite their similarity to zoning provisions, the deed restrictions are a property interest, a restrictive covenant on land, that cannot be abrogated by any act by a zoning board. See Killorin v. Zoning Bd. of Appeals of Andover, 80 Mass. App. Ct. 655, 658-659 (2011) ("litigation to enforce zoning provisions is not a proceeding affecting the title to land or the use and occupation thereof, as contemplated by [restrictions created by deed, instrument, or will pursuant to G. L. c. 184, § 23]" [quotation omitted]).

Finally, 135 Wells's claim that G. L. c. 40B may be deemed to allow abrogation of municipal property rights, where it may not be used to modify corporate or individual property rights, unsupported by any citation, is unavailing.

b. Changing conditions and continued enforceability of the restrictive covenant. In the alternative, 135 Wells argues that the restrictive covenant is invalid because the nature of the property has changed such that the covenant no longer provides the benefit intended when it was purchased. 135 Wells contends that the covenant is no longer valid because it purports to ensure that the property remains a limited manufacturing district, and yet there are no manufacturing uses on the property.

Restrictions on the use of property are valid only if they are beneficial. "No restriction shall in any proceeding be enforced . . . unless it is determined that the restriction is at the time of the proceeding of actual and substantial benefit to a person claiming rights of enforcement." G. L. c. 184, § 30. In general, we have noted that restrictions on land are disfavored and should be as limited as possible. See Stop & Shop Supermkt. Co. v. Urstadt Biddle Props., Inc., 433 Mass. 285, 290 (2001); G. L. c. 184, § 23 (restrictions in deed that are "unlimited as to time" are limited to term of thirty years). That is not the case, however, for restrictions on municipally-owned land; municipal deed restrictions are explicitly exempt from the provisions of G. L. c. 184, § 30, and are enforceable in perpetuity.

A restrictive covenant may no longer be valid where a "neighborhood [has] deteriorated or changed its character to such an extent, from the time the restriction was laid on to the time of trial, that enforcing the restriction according to its terms would be merely quixotic -- failing to serve the grantor's original purpose and impeding present desirable and feasible uses." Cogliano v. Lyman, 370 Mass. 508, 512 (1976). On the other hand, if "the neighborhood [is] still maintaining its essential character, although against some odds, with the restriction serving, as it was intended to serve, to reduce those odds or prevent their getting longer," then the restriction remains valid. Id.

In this case, while the property does not support any manufacturing uses (and apparently never did), [12] and thus is not being used for the precise purpose for which the restrictive covenant was created, the restrictions still provides valuable benefits to the city. See G. L. c. 184, § 30. The judge found that the covenant restricts all residential use of the land, while maintaining an active economic district, protecting certain areas as open space, and maintaining buffer zones which protect the Charles River from encroaching development. This benefits the city's parcel, which itself is restricted to being used for conservation or parkland, as well as the owners of the neighboring parcels. See Cogliano v. Lyman, 370 Mass. at 512. Therefore, we agree that the nature of the district has not changed so much as to invalidate the restrictive covenant.

Judgment affirmed.

footnotes

[1] Zoning board of appeals of Newton and city of Newton.

[2] Justice Hines participated in the deliberation on this case prior to her retirement.

[3] In Newton, the board of aldermen act as both the legislative body for the city and, in separate proceedings, as the city's zoning board and permit granting authority under the police powers. In March, 2015, during the pendency of these proceedings, the board of aldermen changed its name to the "city council." As do the parties, the housing appeals committee of the Department of Housing and Community Development (HAC), and the Land Court judge, we refer to the board of aldermen (aldermen) as it was known during the proceedings before the HAC and the Land Court.

[4] We acknowledge the amicus brief of the Citizens' Housing and Planning Association.

[5] Abutters challenged the change in the zoning ordinance as illegal "spot zoning." See Sylvania Elec. Prods. Inc. v. Newton, 344 Mass. 428, 429 (1962). This court affirmed the aldermen's reclassification as a valid exercise of the zoning power. Id. at 436.

[6] Parcel 2 also has a deed restriction which provides that, for "ninety-nine (99) years from [the purchase] date, no buildings or structures shall be erected or maintained on the granted premises except for recreation, conservation or parkland purposes (but this shall not be deemed to prohibit construction of fences thereon)."

[7] The restrictions in the deed also are properly termed a "restrictive covenant" or a "negative easement." See Patterson v. Paul, 448 Mass. 658, 662-663 & n.7 (2007).

[8] The affordable housing act was enacted in August, 1969. See St. 1969, c. 774. The deed restrictions at issue here were put in place in the option to purchase in 1960; the city executed the option agreement in July, 1960, and recorded it in the Middlesex South registry of deeds. The city exercised the option and purchased parcel 2 on May 22, 1969, before the statute became effective.

[9] The judge characterized 135 Wells's functional equivalence argument as "[135 Wells] is making an 'if it walks like a duck and quacks like a duck' argument: if the [a]ldermen act like a zoning board in waiving and amending the [r]estrictions, they should be treated as one for the purposes of [G. L.] c. 40B, and their waivers of the [r]estrictions should be subject to the [ZBA's] authority to issue permits and waive other regulations under c. 40B."

[10] 135 Wells claims on appeal that if the amendment process is indeed the disposition of a real property right, and not the issuance of a "permit of approval," the aldermen's amendments to the restrictive covenant were improper because the city did not follow the procedures for the disposition of municipally-owned property set forth in G. L. c. 40, §§ 3, 15; G. L. c. 30B, § 16, and certain city ordinances. Therefore, the argument continues, the amendments were not dispositions of real property, but instead were permits or approvals.

We need not consider whether any of these statutes concerning the disposition of municipally-owned real property are applicable to the modification of real property rights, such as restrictive covenants, at issue here. Even if that were the case, and even if the aldermen did

not follow the procedures set forth for the disposal of municipally-owned property in allowing the previous amendments, a conclusion we do not reach, the question has no bearing on whether the amendments were permits or approvals which the ZBA had authority to issue pursuant to G. L. c. 140B, and thus is not dispositive of any issue before us.

[11] 135 Wells argues, hypothetically, that a decision in favor of the ZBA and the HAC would allow municipalities to influence private landowners to create deed restrictions so as to prevent the development of affordable housing. It posits that towns or private individuals could acquire real property and limit the types of authorizations encompassed within "permits or approvals," by restricting access to municipal utilities and services such as sewer lines, water lines, streets, and sidewalk access, through restrictive covenants no longer subject to the requirements of G. L. c. 40B.

The HAC suggests that this concern is best addressed through a "bad faith exception" under which a local zoning board of appeals would examine the provisions of a restrictive covenant owned by a municipality and make a determination whether the restrictive covenant was created in good faith. In this view, if the restrictive covenant was created in good faith -- for purposes other than avoiding the municipality's obligations under G. L. c. 40B -- then the holding in Groton would apply, and a local zoning board of appeals would have no authority under G. L. c. 40B to modify a restrictive covenant under. But, if the ZBA determines that the restrictive covenant was created in bad faith -- to avoid the municipality's obligations under G. L. c. 40B -- then the ZBA could modify the restrictive covenant as part of its power to issue "permits or approvals."

In his written decision, the judge discussed earlier determinations in these proceedings which concluded that there was no bad faith at issue here, given that the language and purpose of the option agreement were established years before G. L. c. 40B was adopted. The judge noted that we have held open the possibility of using a bad faith exception in cases where a town uses eminent domain to take property in order to avoid a development of low-income housing pursuant to c. 40B. See Pheasant Ridge Assocs. Ltd. Partnership v. Burlington, 399 Mass. 771, 777 (1987); Chelmsford v. DiBiase, 370 Mass. 90, 95 (1976) ("We are not understood as passing on a situation in which good faith or public purpose is negated").

We note that, should such a question arise in a future case, we do not ascribe to the HAC's view that it may apply a bad faith exception and order a municipality to take actions that otherwise would be beyond its statutory authority. Nonetheless, a plaintiff is not left without a remedy in such cases, as bad faith may form part of a claim for review of an HAC decision pursuant to G. L. c. 30A, § 14.

As to another concern raised by 135 Wells, that a conclusion that the ZBA lacks authority to modify conditions on city-owned land would permit municipalities to refuse to provide access to roads, sewers, electrical hookups, or other utilities, that issue was clearly decided in Maynard v. Housing Appeals Committee, 370 Mass. 64, 68-69 (1976). Accordingly, the HAC retains the authority to dispense with local requirements or regulations, as is necessary to ensure the completion of a G. L. c. 40B project. Nonetheless, that power clearly does not include the ability to alter real property rights, including restrictive covenants.

[12] The city notes that the nature of manufacturing in general has changed substantially since Sylvania Electric sought to purchase the property in 1960, and that a light manufacturing use would be rare given current economic conditions.