

# BANKER & TRADESMAN

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## LAW of the LAND

### SJC Reinterprets Anti-SLAPP Statute

Ruling Gives Hope To Developers Battling Opponents

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SPECIAL TO BANKER & TRADESMAN

Imagine that you are a real estate developer navigating the Massachusetts permitting process. You committed time and money to a project that will reward your risk-taking, while addressing community needs.



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Unfortunately, your neighbors challenge your project at every turn, instigating local hostility, challenging your permits, and complaining to the authorities whenever anything is amiss on your property.

Delays increase your costs, endangering your project and your mental health.

Had you asked your attorney last winter if you could sue your neighbors for abuse of process or tortious interference because of their tactics, he or she probably would have answered “no.” If you asked your attorney that same question today, however, the answer might be “maybe,” in light of the Supreme Judicial Court’s decision last May in *477 Harrison Ave., LLC v. JACE Boston, LLC*.

Because of the Massachusetts “anti-SLAPP” statute, most attorneys discourage developers from suing aggressive project opponents. This statute protects the constitutional right to petition courts and governmental agencies to pursue legitimate interests, while penalizing

“strategic litigation against public participation.” Before the statute’s enactment in 1994, developers could silence opponents by threatening them with costly lawsuits. The anti-SLAPP statute remedied this abuse, allowing for expedited dismissals of SLAPP lawsuits and requiring offending plaintiffs to pay their opponents’ legal fees.

After the statute became effective, courts began dismissing SLAPP lawsuits at project opponents’ requests, unless developers showed that the petitioning activities lacked a factual or legal basis (that is, sham petitioning). This standard imposed a difficult burden on developers who sued opponents for exercising petitioning rights. Until recently, courts would not consider the motivations behind opponents’ petitioning activities, when ruling on anti-SLAPP motions to dismiss.

#### Neighborhood Feud In Boston

In *477 Harrison Ave., LLC v. JACE Boston, LLC*, the plaintiff developer planned a residential project in Boston. He explained the project to his abutter, with whom he shared a party wall. Afterward, the abutter supposedly boasted that he would delay the project until the developer defaulted on his loan, whereupon the abutter would buy the developer’s property at a discount.

The abutter made every effort to thwart the developer. When the developer sought zoning relief, the abutter opposed him. When the developer requested streamlined review with the

Boston Redevelopment Authority, the abutter opposed him. The developer’s project stalled.

During the delay, the developer secured a building permit for an “as of right” project, and a court order allowing him to enter the abutter’s property to protect the abutter’s roof while working on the party wall. When the developer’s workers entered the abutter’s property under the court order, the abutter called the police and sought a criminal trespass complaint against the developer. The developer eventually sued the abutter for abuse of process. The abutter predictably moved to dismiss the suit under the anti-SLAPP statute.

The Supreme Judicial Court took up the case. The SJC considered the abutter’s various petitioning activities; namely, submitting opposition statements to local officials, appealing in superior court to stop the project, filing police reports, and applying for the criminal trespass complaint. The SJC recognized that the developer’s abuse of process suit arose solely from the abutter’s petitioning activities, triggering the anti-SLAPP statute. The SJC also found that these petitioning activities were not devoid of factual or legal basis, except for the abutter’s application for a criminal trespass complaint. The SJC ruled that the application for criminal charges was sham petitioning, because the developer had a court order allowing limited entry upon the abutter’s property.

Until recently the SJC’s findings would have resulted in dismissal of the developer’s

abuse of process claim as to the abutter's other petitioning activities, and an order that the developer pay the abutter's legal fees. However, the SJC chose to reinterpret the anti-SLAPP statute. The SJC ruled that although the developer did not prove all the petitioning activities to be a sham, the developer could nevertheless advance his abuse of process claim by showing that he did not file suit

to chill legitimate petitioning activities, but instead to recover damages for the abutter's misconduct. The SJC added, in a footnote, that the motivation behind the abutter's petitioning activities could be relevant under this new interpretation.

The case was remanded to the superior court for further deliberations, where it continues to fester. Whatever the eventual out-

come of the case, the SJC's updated interpretation of the anti-SLAPP statute gives hope to developers considering legal recourse against abutters that unfairly use petitioning activities to block real estate projects. ■

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