

CHAPTER 40B CASE LAW UPDATE

by

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The past year has been extraordinarily busy for cases involving comprehensive permits under G.L. c. 40B. This memorandum sets forth a brief overview of relevant issues issued by the Supreme Judicial Court and Appeals Court in the past year. In addition, selected cases from the trial courts and the Housing Appeals Committee are included.

SUPREME JUDICIAL COURT (SJC)

Taylor v. Housing Appeals Committee, Mass. , 2008 WL 962860 (2008)

This decision upheld the validity of a Department of Housing and Community Development (DHCD) regulation that the date of calculation for a municipality's stock of low and moderate income housing is the date on which the city or town's zoning board of appeals files its decision with the municipal clerk. Developers applied for a 36 unit affordable housing comprehensive permit. The Lexington ZBA approved the comprehensive permit with a condition limiting the project to 28 units. Developers appealed to the HAC, which ordered the ZBA to issue a comprehensive permit for 36 units. Abutters appealed to the Superior Court, and filed an emergency motion to dismiss, arguing the HAC lacked subject matter jurisdiction because, after the board's decision, but prior to the HAC's decision, the Town of Lexington achieved the 10% statutory minimum.

The SJC noted that the HAC's administrative decision in Casaletto Estates, LLC v. Georgetown Board of Appeals (2003) set the date the zoning board's decision is filed with the clerk as the appropriate date to calculate if the town has met the 10% goal. In Casaletto, the HAC determined that the language of chapter 40B §20, which states that local zoning requirements are consistent with local needs "when imposed by a board of appeals after a comprehensive hearing", "suggests that a municipality's progress toward the ten per cent threshold should be calculated when restrictions...are actually imposed, that is, at the time the decision of a zoning board of appeals is rendered." Taylor, slip op. at p. 4. The DHCD codified the Casaletto decision in 760 CMR 31.04(1)(a) in 2004.

The SJC stated that it would overturn a properly promulgated regulation only if inconsistent with the authorizing statute or irrational. The SJC found that the regulation was not inconsistent with the statute, as the regulation filled in a "gap" in the statute. The Court further

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found that the regulation struck a balance between the interests of the municipalities and those of the developers, and was a permissible policy choice as to which the SJC would defer to DHCD as the administrative body responsible for implementing the statute. Therefore, the SJC denied the abutter's emergency motion and determined the HAC had authority to review the matter.

The effect of this case, and the Canton case that follows, is limited, since the new Regulations promulgated by DHCD now require that the city or town must have reached the statutory minimum as of the date that an application is filed with the board of appeals. 760 CMR 56.03(1). Having found that the regulation which determined compliance with the 10% goal as of the date the ZBA decision is filed was rational, based upon the language of chapter 40B §20, it will be interesting to see if the courts will uphold the new regulation if challenged.

Zoning Board of Appeals of Canton v. Housing Appeals Committee, Mass. , 2008WL859 (2008)

In this case the SJC, echoing the findings of Taylor, determined that the Housing Appeals Committee (HAC) had authority to consider a developer's appeal because Canton did not reach the 10% statutory minimum until after the zoning board's decision was filed. After reviewing a developer's comprehensive permit application, the zoning board of appeals of Canton denied the application primarily because the increased traffic would be inconsistent with the local needs. The developer appealed the decision to the HAC. While the appeal was pending at the HAC, the board of appeals issued comprehensive permits that put the town over the 10% threshold. The board then moved to dismiss the developer's appeal on the grounds that the Town of Canton had achieved the 10% threshold. The HAC denied the board's motion, based on the regulation (760 CMR 31.04), and ordered the board to issue a comprehensive permit to the developer. The board appealed the HAC's decision to the Superior Court, where the court ruled in favor of the town, finding that the regulation skewed the balance of chapter 40B too far in favor of the developer

The SJC reversed the Superior Court's determination because, although the legislative purpose of the statute (c.40B, §20) is to strike a balance between increasing development of affordable housing and preserving traditional municipal authority in land use decisions, the "balance is not unlawfully affected by the timing set forth in the regulation". The SJC noted the HAC was correct in denying the zoning board's motion to dismiss because the 10% threshold was, as noted in the zoning board's original decision, not met until after the board's decision was filed. As the SJC made clear in Taylor, the regulation was not inconsistent with the authorizing statute or irrational, and therefore, the HAC had authority to review to zoning board's decision.

Zoning Board of Appeals of Groton v. Housing Appeals Committee, 451 Mass. 35 (2008)

In this decision, the SJC determined that the Housing Appeal Committee (HAC) "exceeded its authority under G.L. c. 40B by ordering the [Groton Electric Light Department] (or the town) to convey the sight line easement on the town's property because the Act confers no

authority on the committee to order a municipality to convey an easement and, in so doing, the committee contravened State law.” The local board of appeals had denied the comprehensive permit for, among other reasons, several safety hazards, including a lack of stopping sight distance for motor vehicles traveling south by the site entrance/exit, and the lack of adequate access for emergency vehicles due to only one site entrance. The HAC overturned the board of appeals, despite agreeing that the access road, if built with no changes to the sight lines, would constitute a safety hazard. The HAC determined that the safety hazard could be eliminated by regrading and clearing vegetation on abutting property owned by the Town and under the control of GELD. Although GELD was not willing to grant the developer an easement for this purpose, the HAC determined that it had the power to require GELD to grant the easement. Further, the HAC determined that the lack of a second access could be remedied by a dirt roadway that would require a crossing of 15 feet of town property, and that, if GELD did not grant that easement as well, it would order it to do so.

The SJC found that the HAC did not have the authority to “directly or indirectly” order the conveyance of an easement, which is an interest in land. An order directing the conveyance of an easement cannot be derived from the power granted under G.L. c. 40B to issue “permits and approvals” in the same manner as local boards or officials who would otherwise act with respect to the application. In addition, the SJC found that the requirement that Town Meeting approve the conveyance of an interest in land was more than a “local requirement”; the requirement of Town Meeting approval is imposed by state law, which the HAC is not authorized to waive. This case marks a significant victory for protection of local autonomy in an area where rulings in favor of cities and towns are few and far between.

Boothroyd v. Zoning Board of Appeals of Amherst, 449 Mass. 333 (2007)

In this case, the Supreme Judicial Court determined that the Amherst Board of Appeals had the authority to determine there was a regional need for affordable housing even after the town had fulfilled its minimum obligation of 10% affordable housing units, and the Board of Appeals decision to grant a comprehensive permit was upheld. Under the comprehensive permit statute, G.L. c. 40B, a board of appeals may override certain local requirements, such as zoning bylaws, if the local requirements are deemed inconsistent with local needs. This determination requires the Board to balance the regional need for affordable housing against local health, safety, and planning concerns. When a city or town has not reached its minimum housing goal under chapter 40B, the regional need for affordable housing is deemed compelling. In this case, the Board of Appeals considered a comprehensive permit application filed after the city had reached its 10% goal. A group of residents, including some abutters, challenged the permit, arguing that, once the City met the minimum affordable housing goal, the zoning bylaws must be imposed.

The court disagreed, finding that nothing in Chapter 40B divests a local board of appeals of the authority to grant a comprehensive permit once the city or town has met its minimum housing goal. The court noted that, once the minimum housing goal is met, the local board of

appeals may exercise its discretion to apply the zoning bylaw, and is not required to grant a comprehensive permit. The court's decision, however, allows a city or town to grant comprehensive permits even after attaining the minimum affordable housing goal, if the local board of appeals finds that there is still a need for affordable housing and that it outweighs any local concerns.

Middleborough v. Housing Appeals Committee, 449 Mass. 514 (2007)

This case affirmed that a financing commitment from the New England Fund (NEF) qualifies as a subsidy from the federal or state government such that the developer may apply for a comprehensive permit. In order to apply for a comprehensive permit under G.L. c. 40B, the proposed development must be subsidized by the federal or state government under a program to assist the construction of low or moderate income housing. Since the HAC first ruled that the NEF was an eligible federal subsidy program, a number of cities and towns have questioned whether the NEF is indeed a federal subsidy program. The Appeals Court had ruled in this case that the NEF did qualify as a federal subsidy. On further appeal, the SJC upheld that ruling, although on somewhat different grounds. The SJC first stated that it must give deference to the HAC's decision. It noted that the word "subsidy" is not defined in G.L. c. 40B, but is broadly defined in the HAC regulations. The Court further relied on an earlier ruling in which it had found that a low-interest loan from MHFA constituted a subsidy under chapter 40B, and saw no difference in the low-interest loan provided under the NEF.

Jepson v. Zoning Board of Appeals of Ipswich, 450 Mass. 81 (2007)

The SJC in this case determined that a local zoning board of appeals may override local zoning requirements when a commercial use is included within an affordable housing development, at least if the commercial use is allowed by the underlying zoning bylaw. The YMCA of the North Shore, Inc. applied for a comprehensive permit for 48 rental units in two separate structures, one of which would include 8,220 square feet of commercial space on the first floor. Although commercial uses are allowed in the zoning district, the proposed commercial element of the development would violate the minimum setbacks. Jepson, an abutter, as well as the Ipswich Housing Authority, which owned property directly across the street, both appealed. As is usually the case in such appeals, the first issue contested was whether plaintiffs had standing to appeal. The court determined that Jepson had standing to appeal based upon flooding of his property, as flooding constitutes an injury to an interest which G.L. c. 40B was intended to protect. The SJC also found that a housing authority may have standing where it owns land that directly abuts a proposed chapter 40B development. The Court distinguished the case of Planning Board of Hingham v. Hingham Campus, LLC, 438 Mass. 364 (2003), where it had determined that a planning board did not have standing to appeal a comprehensive permit because municipal boards and officers are not "persons" for purposes of standing. In this case, the Housing Authority owned land abutting the proposed development, and therefore had standing as an abutter, rather than attempting to rely on its status as a public entity.

On the merits of the case, the Court noted that affordable housing developments do not benefit only those who qualify for the housing. It pointed out the fact that only a minimum percentage of affordable housing units are required for a comprehensive permit development, with the remainder being market rate units. Thus, the Court extended that “flexibility” to include an “incidental commercial component” to provide additional incentives to developers to establish affordable housing. The Court stated that nothing in chapter 40B expressly prohibits the inclusion of incidental commercial uses when such uses are permitted on the property by zoning.

MASSACHUSETTS APPEALS COURT

Wrentham v. Housing Appeals Committee, 69 Mass. App. Ct. 449 (2007)

This case is, in some ways, a follow-up to the Boothroyd case. In this case, the board of appeals denied a comprehensive permit on the grounds that it found that the town had reached its minimum housing goal of 10%. The developer appealed to the Housing Appeals Committee, which overturned the board’s finding that the town was over 10% and remanded the matter back to the board for a hearing and decision on the merits of the application. The board filed a complaint in the Superior Court, arguing that the HAC lacked jurisdiction since the town had met its minimum housing requirement. The Superior Court dismissed the town’s complaint on the grounds that the HAC order was not final or appealable, and that the town must first exhaust its administrative remedies through the remand process and full agency review. The Appeals Court affirmed the Superior Court.

The Appeals Court ruled that decisions as to whether a town has met its minimum housing requirement is factual question entrusted to the HAC. Relying on the Boothroyd case, the Appeals Court pointed out that, even if the town were correct that it had met its 10% minimum, the board should still provide a full hearing to the comprehensive permit application, as the board may find that the need for affordable housing still exists. The Appeals Court cited the familiar law that judicial review is not generally available for agency decisions that are not final. Since the HAC order of remand left the board with discretion as to how to act on the application after the public hearing, it was not a final decision and not appealable.

SUPERIOR COURT

Groton v. Housing Appeals Committee, Suffolk Superior Court CA No. 06-3793 (2007)

In this case, the board of appeals granted a comprehensive permit to Groton Residential Gardens. The board subsequently amended the permit to address flooding and ground water concerns. Gardens appealed the modifications to the Housing Appeals Committee (HAC), which appointed a Presiding Officer to conduct the hearing. The town submitted a request to review the Presiding Officer’s proposed decision and present argument to a majority of the HAC. The Presiding Officer denied the request on the grounds that the full HAC was not deciding the case, then unilaterally decided the appeal, striking the modifications made by the board, eliminating

several requirements of the original permit, and ordering the building official to issue occupancy permits. The Superior Court (Cratsly, J.) found that the Presiding Officer exceeded his authority and employed unlawful procedure when he decided the dispute. The court found that the state regulations do not permit the Presiding Officer to rule on the economic feasibility of a project or enforce a permit previously issued by a local board. The Court remanded the matter back to the HAC for further proceedings before the full HAC.

O.I.B. Corporation v. Housing Appeals Committee, Suffolk Superior Court CA No. 2006-1704 (2007)

In this case, in which the board of appeals was represented by Petrini & Associates, the denial of a comprehensive permit by the local board based upon safety concerns was upheld by the HAC and subsequently the Superior Court. The Braintree Board of Appeals denied a comprehensive permit to plaintiff on the grounds that the Town had met the 1.5% land area minimum under chapter 40B, and on the grounds that the developer had failed to pursue the application as it failed to submit required information and failed to attend a scheduled public hearing date. OIB appealed to the HAC, which ruled that the Town failed to establish that it had met the 1.5% criterion, and remanded the matter to the Board. The Board held further hearings, and denied the application again, on the basis that the town had met the 1.5% criterion, and, in addition, had met the 10% criterion prior to the Board issuing its decision after remand as the Board had approved additional comprehensive permits while the OIB appeal was pending at the HAC. On the merits of the application, the Board found that the application was inconsistent with local needs, as, among other things, the site did not have sufficient emergency access for the 118 units, where there was only one means of access to the proposed development. The Town's subdivision regulations limited the length of cul-de-sacs to no more than 400 feet, which is the maximum length of fire hose that can be laid quickly in the event of a fire. Approximately 100 of the proposed homes would be beyond the 400 foot limit, with some as far as 1500 feet from the site entrance.

The HAC ruled that under its regulations the 1.5% criterion must be satisfied as of the date of the application to the Board, and that the Town had not reached the 1.5% minimum as of that date. It further ruled that the first decision of the Board was the applicable date to determine whether the Town had met the 10% criterion, not the date of the second, final decision. The HAC therefore ruled that it had jurisdiction over the appeal. On the merits, it upheld the decision of the Board, finding that the concern for emergency access outweighed the regional need for affordable housing. OIB appealed to the Superior Court, which upheld the HAC decision.

HOUSING APPEALS COMMITTEE

511 Washington Street, LLC v. Hanover Zoning Board of Appeals, No. 06-05 (HAC, 2008)

Here the Housing Appeals Committee (HAC) determined that the purpose of G.L. chapter 40B, is not to guarantee an economic return to the developer, but neither should a

developer be prevented from making a change in a development that has become uneconomic unless the board of appeals has established that there are countervailing local concerns. In this case the developer was granted a 40B permit to construct 74, age restricted rental units. After construction was complete, the developer sought to change the development to non-age restricted rental housing in order to make the project economically feasible. The Hanover Board of Appeals denied the request. The HAC concluded that the development with the age restriction made the project uneconomic, whereas the lease up projections without the age restriction would likely make the project economic. The HAC then determined that maintaining affordable rental housing supported the local need for affordable housing, but keeping the project age restricted was not supported by any evidence of local need. Therefore, the HAC directed the board to remove the age restricted condition on the comprehensive permit because the board had not established a countervailing local concern to support the denial.

South Center Realty, LLC v. Town of Bellingham Zoning Board of Appeals, 07-03 (HAC, 2008)

In this case, a Presiding Officer of the HAC determined that certain CDBG units that DHCD had included in the Subsidized Housing Inventory (SHI) did not meet the requirements for low and moderate income housing under G.L. c. 40B. The ZBA had denied the comprehensive permit on the grounds that the town of Bellingham had already exceeded the 10% statutory minimum requirement for affordable housing units as reflected in the SHI. The applicant, however, appealed the denial and challenged the inclusion of the CDBG units.

The Presiding Officer determined that various types of CDBG units in the town did not meet the requirements of chapter 40B. The “old-form” owner occupied units did not qualify for the SHI because they did not include an affordability use restriction, as required by 760 CMR 56.02. The “new-form” owner occupied units did not qualify for the SHI because the HAC determined that the 15 year lien that is recorded for each property is not a use restriction, does not guarantee affordability of a housing unit, and only guarantees affordability of a rehabilitation project. The rental units did not qualify because the 5-year term of the Rental Agreement was too short to comply with the DHCD’s requirements of a minimum 15-year use restriction. The removal of the CDBG units reduced the Town’s low and moderate income housing percentage to 9.45%. Therefore, the Presiding Officer denied the ZBA’s motion to dismiss the appeal.

Oceanside Village, LLC v. Scituate Zoning Board of Appeals, HAC (2007)

The Housing Appeals Committee (HAC) ordered the issuance of a comprehensive permit for 250 units of condominiums, after the developer appealed the Board’s decision to grant a permit for 150 units with a number of conditions. The hearing officer ruled that the approval of the permit was actually a denial of the permit, thus shifting the burden of proof in the hearing. The HAC also ordered the town’s DPW to grant necessary approvals for municipal sewer, despite the limited capacity of the town’s wastewater treatment facility. The Board argued that the HAC has no authority to deem a conditional approval a denial, and that such a ruling is

contrary to the statute. It further contended that the DPW is not a “local board” under chapter 40B, and therefore the HAC did not have jurisdiction to enter an order requiring the DPW to approve water and sewer extensions. The board further argued that the Town’s twenty year period of studying the priority areas in town for sewer based on factors such as septic system failures and soil conditions, was a valid local need that outweighed the regional need for low and moderate income housing. In addition, there were issues raised as to density, planning concerns, payment of consultant fees for town counsel advice rendered to the board of appeals, and a host of other issues. This case is on appeal to the Superior Court. The issue as to whether the HAC may find that a conditional approval is a denial is currently before the SJC in the case of Woburn Board of Appeals v. Housing Appeals Committee, SJC-10014, which has been argued and is awaiting decision.

Attitash Views, LLC v. Amesbury Zoning Board of Appeals, HAC No. 06-17 (Oct. 15, 2007)

In this case, the HAC determined that a local zoning board of appeals does not have the right to impose conditions on a comprehensive permit which limit how the housing may be subsidized, involve the board in the drafting of documents to ensure long-term affordability, determine eligibility for renters, influence marketing, determine the monitoring agent, determine how parts of the calculation of the profits limitation will be conducted, or “otherwise insert itself into programmatic aspects of the development.” The HAC ruled that these types of issues are reserved for the “state government”, in particular the Department of Housing and Community Development and MassHousing. The HAC first ruled that the developer did not need to prove that the conditions rendered the project uneconomic, even though such a requirement is found in G.L. c. 40B §23 when a developer appeals conditions imposed by a local board of appeals. The HAC ruled that the requirement that the developer prove that the conditions render the project uneconomic did not apply since the challenge was as to the legality of the conditions. On the merits, the HAC struck down or revised numerous conditions on the grounds that the local board of appeals does not have jurisdiction over issues such as financial arrangements, profit projections, developer’s qualifications, and marketability, which are deemed to be reserved to the subsidizing agency.

Barbara J. Saint André is senior land use attorney at Petrini & Associates in Framingham. She has over 24 years of experience representing cities and towns across the state as town counsel and special counsel, with particular emphasis on land use (including zoning, comprehensive permits, Chapter 40R, housing, subdivision, planning, health, zoning enforcement, and wetlands), and general municipal law. Petrini & Associates is a public law firm concentrating in the practice of municipal law, public construction, labor, and land use and zoning. The firm is town counsel to Framingham and Medway and special counsel to numerous other communities.