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SJC Rules That Chapter 40B Allows Commercial Use within an Affordable Housing Development

Affirming the “flexibility” that the legislature built in to Chapter 40B, the Supreme Judicial Court has ruled that a comprehensive permit can authorize not only housing, but in the some cases “incidental commercial uses” in a housing development.

In *Jepson v. Zoning Board of Appeals of Ipswich*, two abutters challenged the board’s decision to grant a comprehensive permit to a development because one of its two structures, which violated setback requirements of Ipswich’s zoning bylaw, contained ground-floor commercial uses. While acknowledging that Chapter 40B gave the board the power to waive setback violations for housing, the abutters claimed that the board lacked the authority under Chapter 40B to waive local dimensional requirements for the commercial component. Instead, they argued, the developers had to obtain a variance of those requirements.

The Supreme Judicial Court disagreed. The court first noted that this mixed-use structure was located in a commercial zone, where the commercial uses proposed by the developer—a day care center, a bank and a coffee shop—would be permitted as of right. Nothing in Chapter 40B expressly prohibits the inclusion of incidental commercial uses “to complement an affordable housing development,”

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in a zone where such uses are permitted, the court added. Furthermore, the court said, the legislature took into account that developers of affordable housing need to generate a reasonable economic return on their investment, pointing to the developer's right to appeal conditions attached to the permit if they rendered the project uneconomic. Granting developers comprehensive permits containing dimensional waivers which cover the commercial as well as the residential components of a mixed-use development would further the legislative purpose "that developers of affordable housing need to generate a reasonable economic return on their investment."

This is welcome news to developers who envision modern structures that encompass more than simply residential units, and towns that welcome modern planning concepts such as smart growth and mixed-use development. The decision also benefits the residents of these developments, who will have commercial services literally at their doorsteps.

But *Jepson* leaves two central questions unanswered. First, can a comprehensive permit also waive bylaw *use* provisions by allowing construction of a mixed-use development in a residential zoning district? Here the court was careful to note, more than once, that the mixed-use structure was in a commercial zoning district, so the court did not need to face that question. And, second, if only "incidental commercial uses" can be authorized by comprehensive permit, how much commercial development is "incidental"? Justice Greaney, the author of the *Jepson* opinion, mused about this topic at oral argument, but his opinion leaves that issue to be resolved in future cases.

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