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New Superior Court Decision Creates Split in Authority about What Happens to Pending Appeals when Town Reaches 10% Subsidized Housing Threshold

Earlier this month, Mintz Levin's Housing Practice Group issued an advisory regarding an Appeals Court decision that potentially undermined Chapter 40B by keeping alive an abutter group's original appeal of a comprehensive permit to construct subsidized housing even though that permit had been later modified by the Housing Appeals Committee (HAC) and the same abutters group had filed a separate appeal of the modified permit. *See* Mintz Levin Housing Advisory, "Appeals Court Grants Abutters Two Chances to Appeal Comprehensive Permits; Ruling Raises Practical Questions," April 6, 2007. Now the Massachusetts Superior Court judge handling that parallel appeal, the abutter's appeal of the HAC's modified comprehensive permit for the same project, has issued a decision affirming the HAC decision in all respects. It is not so much that affirmance, however, that makes this Superior Court decision significant. The new decision issued a ringing endorsement of the HAC's method for handling appeals already in process from a town that reaches the 10% threshold for subsidized housing units.

Chapter 40B says that once a municipality is deemed by the Department of Housing and Community Development (DHCD) to have 10% or more of its overall housing stock comprised of "countable" subsidized housing, that city or town is able to deny a new comprehensive permit application without fearing a developer appeal. But what happens when a city or town reaches the magic 10% threshold ***after*** the zoning board of appeals (ZBA) issues its decision (either a denial or an approval with conditions) and the developer is

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appealing the decision?

The new Superior Court decision in *Taylor v. Housing Appeals Comm.*, No. 05-2910-B (Suffolk Superior Court April 9, 2007) (Kottmyer, J.) holds that the time for measuring when a municipality can invoke the 10% safe harbor to forestall a comprehensive permit applicant's right of appeal is when the ZBA decision on that application is filed with the city or town clerk. Therefore, if a ZBA denies an application (or approves it with conditions objectionable to the applicant) while the city or town is still below 10%, the applicant's HAC appeal can proceed even if the municipality later reaches 10%. This counting rule, already codified in DHCD regulations and enunciated in HAC decisional law, provides a measure of protection to developers from the danger of "dueling applications" by preventing a ZBA from extinguishing an applicant's appellate rights in mid-appeal by later approving another 40B application that puts the town over 10%.

As we reported in a November 2006 Housing Advisory, a Superior Court decision issued at that time had purported to change this counting rule by casting aside the DHCD regulation and HAC decisional law: a municipality could use its achievement of the 10% safe harbor ***at any time*** during the pendency of a developer's appeal (at the HAC or in subsequent court appeals) to stamp out that applicant's appellate rights, the Superior Court had then ruled. *See* Mintz Levin Housing Advisory, "Superior Court Decision Changes Rules about How to Count to 10% under Chapter 40B," November 21, 2006 (discussing *Zoning Board Appeals of Canton v. Housing Appeals Comm.*, No. CV2005-01868 (Norfolk Superior Court, Nov. 10, 2006) (Grabau, J.)). That 2006 Superior Court decision by Judge Grabau in *Canton* heightened developers' risk from "dueling applications" to open-ended, project-lethal dimensions. The developer in *Canton* and the HAC have appealed that decision.

In her decision in *Taylor*, Judge Kottmyer pulled no punches in disagreeing with Judge Grabau's analysis of the 10% safe harbor, pointing to "inherent contradiction[s]" in *Canton*'s reasoning. "DCHD could rationally conclude," Judge Kottmyer wrote, "that a regulation fixing the date for determining compliance with the [10%] statutory minima was necessary to eliminate a degree of uncertainty that would discourage applications and/or appeals and to minimize opportunities for manipulating the process after a Board had issued a decision and before its merits had been reviewed."

Judge Kottmyer's decision in *Taylor* therefore brings a welcome reaffirmation of DHCD's and the HAC's counting rule on the 10% safe harbor, as well as a split in Superior Court authority on the point. The Massachusetts Appeals Court's eventual decision in review of

the *Canton* decision—and possibly of Judge Kottmyer's *Taylor* decision, should the abutters to the *Taylor* development launch yet another appeal of her decision, as they probably will—is likely to resolve the divergent Superior Court rulings on how to count to 10% under Chapter 40B.

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Paul Wilson and Noah Shaw of Mintz Levin's Housing Practice Group participated in Taylor v. Housing Appeals Committee as co-counsel for the Chapter 40B developer. If you would like to discuss the Taylor decision or other matters concerning subsidized housing, or would like copies of the earlier Housing Advisories discussed in this advisory, please contact any member of Mintz Levin's Housing Practice Group listed below.

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