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# Massachusetts Appeals Court Holds that Town Cannot Appeal MassHousing's Chapter 40B Project Eligibility Determination in State Court

In a victory for the Massachusetts Housing Finance Agency ("MassHousing") and the subsidized housing developers whose projects the agency deems preliminarily eligible under G.L. c. 40B, §§ 20–23 ("Chapter 40B"), the Massachusetts Appeals Court has held that a municipal body could not go to state court to appeal the project eligibility determination MassHousing issued at the outset of a Chapter 40B comprehensive permit process. Paul D. Wilson, Co-Chair of Mintz Levin's Housing Practice Group, represented MassHousing in the Appeals Court oral argument.

In *Town of Marion v. Massachusetts Housing Finance Agency*, 68 Mass. App. Ct. 208 (2007), issued on February 12, the Town of Marion brought a lawsuit in state Superior Court seeking the reversal of the MassHousing decision to issue a project eligibility letter for a 192-unit subsidized rental development in the Town of Marion. MassHousing issues such letters to developers whose proposed projects it decides are merely eligible for funding as subsidized developments under Chapter 40B, and such determinations allow the developer to then file its Chapter 40B application with the local zoning board of appeals (ZBA).

The town's appeal of the MassHousing project eligibility decision was two-pronged, seeking relief under both the Massachusetts declaratory judgment and certiorari statutes. The Superior Court judge dismissed the suit, holding that the town could not proceed in state court under either statute, and that the appropriate forum to initially challenge the MassHousing determination was the state Housing Appeals Committee (HAC), which is the quasi-judicial administrative body created by Chapter 40B to hear developers' appeals of ZBA decisions denying comprehensive permit applications or approving

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them with conditions that would make a project uneconomic.

In *Marion*, at the time the town filed its Superior Court appeal of the MassHousing project eligibility letter, the developer already had initiated its own appeal at the HAC based on the decision of the Marion ZBA to "approve" a project conditioned upon a maximum of 96, rather than 192, units.[1] Because the HAC proceeding was available, the Superior Court judge ruled that the town first needed to make its case against the MassHousing determination there and, if unsuccessful at the HAC, in a Superior Court appeal alleging that the HAC decision was unreasonable. (And, indeed, after the HAC granted the developer a comprehensive permit for all 192 requested units, the Town of Marion filed a separate Superior Court appeal, still pending today, of that HAC decision).

The Appeals Court agreed with the Superior Court's decision to dismiss the appeal of the MassHousing project eligibility determination. Because the town had not exhausted its administrative remedies at the HAC, it could use neither the declaratory judgment nor the certiorari statute to pursue reversal in state court of the preliminary step embodied by the project eligibility letter. The place to make that challenge, the Appeals Court ruled, was in the pending HAC proceedings. Further, with respect to the town's certiorari cause of action, the court held that MassHousing's determination was not the kind of judicial or quasi-judicial—that is, final and binding—ruling that is a prerequisite to a certiorari claim. Rather, the project eligibility determination is just that: a decision that the developer's proposed project is merely *eligible* under Chapter 40B.

The *Marion* case represents a setback to Chapter 40B opponents who wish to lodge appeals at any stage in the process—even the earliest project eligibility stage—in an effort to delay and, by so doing, derail, a subsidized housing project.

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[1] Such "approvals" by local ZBA's that substantially reduce the number of units proposed by the developer may, if requested by the developer, be deemed a denial by the HAC, significantly altering the burdens of proof in those proceedings in a manner favorable to the developer. Paul Wilson and his colleague Benjamin Tymann have successfully petitioned the HAC in another case, representing a Chapter 40B developer, to deem a similar ZBA "approval" a denial.

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*If you would like to discuss the* Marion *decision or other matters concerning subsidized housing, please contact any member of Mintz Levin's Housing Practice Group listed below.*

Daniel O. Gaquin

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