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Appeals Court Grants Abutters Two Chances to Appeal Comprehensive Permits; Ruling Raises Practical Questions

In a decision issued this past week, a panel of the Massachusetts Appeals Court considered what it called the "somewhat perplexing question" of the interaction between the two appeal tracks provided in M.G.L. c. 40B: an abutters' appeal filed directly in the Superior Court, and a developer's appeal filed initially with the Housing Appeals Committee and then subject to further judicial review in the Superior Court. The result was a ruling that chipped away at one of the cornerstone principles of Chapter 40B: promoting the timely construction of subsidized housing by minimizing the delays that result from protracted court appeals brought by affordable housing opponents.

Taylor v. Bd. of Appeals of Lexington, 68 Mass. App. Ct. 503, 2007 WL882136 (March 27, 2007), involved two Superior Court appeals brought by the same abutters opposing two versions of an affordable housing development. The abutters filed their first appeal in 2003, when the Lexington Board of Appeals approved, with conditions, a comprehensive permit application. That 2003 abutter appeal was stayed while the developer pursued its own simultaneous appeal to HAC. In 2005, HAC issued a new comprehensive permit that removed several of the Board of Appeals' conditions that the developer had challenged. Most significantly, HAC's new permit approved the 36 units originally requested by the developer, removing the Board of Appeals' condition that had reduced the size of the project to 28 units. In 2005, the abutters appealed this HAC decision to the Superior Court as well.

Now faced with two court appeals by the same abutters, the developer asked the Superior Court to dismiss the 2003 appeal. The developer

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argued that, because the new HAC permit had superseded the original permit, the abutters' 2003 appeal of that first permit was now moot. The Superior Court agreed, stating that the abutters' 2005 appeal of the new HAC permit was the appropriate vehicle to pursue their opposition to the affordable housing development. The abutters appealed on that point to the Massachusetts Appeals Court, resulting in last week's decision.

The Appeals Court panel agreed with the abutters that the Superior Court should not have dismissed their 2003 appeal. The Appeals Court gave two reasons. First and foremost, Chapter 40B explicitly grants "persons aggrieved" a right to appeal to the courts, and the Appeals Court was unwilling to deprive them of that right just because the permit they had appealed had been replaced in the course of the developer's appeal. Second, the Appeals Court found "not insignificant" differences between arguments that the abutters would be allowed to make at HAC versus in court.

Just last summer, in its most recent Chapter 40B decision, the Supreme Judicial Court described a core purpose of Chapter 40B in a way that would appear to have driven a stake through the heart of the abutters' argument in *Taylor:* "the clear intent of the Legislature was to promote affordable housing by minimizing lengthy and expensive delays occasioned by court battles commenced by those seeking to exclude affordable housing from their own neighborhoods." *Standerwick v. Zoning Bd of Appeals of Andover,* 447 Mass. 20, 29 (2006). Quoting this language, the Appeals Court panel freely acknowledged that its decision here would frustrate this oft-described statutory goal. But the Appeals Court found that abutters' statutory right to appeal must be balanced against the objective of minimizing delays caused by abutter recalcitrance.

The developer, which filed its comprehensive permit application for this particular project more than five years ago, now finds itself faced with two appeals, in the same court, by the same abutters, of two differing versions of the same permit, one of those versions superseded by the other. Rather than unraveling this awkward situation, the Appeals Court panel threw up its hands and directed the parties to engage in "creative problem solving." That is a naïve hope, especially since the abutters apparently had already described their preferred solution to the Appeals Court: their 2005 appeal of HAC's decision should first complete its voyage through the courts, and then their 2003 appeal should begin its journey through the judicial system, perhaps with the most recent permit substituted for the 2003 version. Presumably the developer will have a different idea. In the meantime, though, Chapter 40B developers statewide are left with a confusing Appeals Court decision that gives little or no guidance on

how to effectively handle the phenomenon of abutters appealing the same permit to court that the developer appeals to HAC — a situation that may become more common as project opponents are emboldened by the *Taylor* decision.

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