Housing Advisory: Housing Appeals Committee Holds that Housing "Need" Is Not Satisfied by Cheap Market Rate Housing, and Sets Other Helpful Precedents

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Towns where housing is not expensive have recently developed a new justification for denying a comprehensive permit application: claiming that there is no Chapter 40B "regional need for low or moderate income housing" because the town's existing market-rate housing is affordable to persons of low or moderate income. In a case litigated by Mintz Levin, the Housing Appeals Committee (HAC) has now rejected that theory as a matter of law. The HAC decision, *Hollis Hills, LLC v. Lunenburg Zoning Board of Appeals* (HAC No. 07-13, Dec. 4, 2009) also clarified how the municipal "planning defense" is applied, and ruled that an adjoining-site zoning violation that allegedly "infects" the project site is relevant only if the zoning violation causes a health or safety problem on the site that outweighs the regional need for affordable housing.

Cheap Market-Rate Housing Does Not Meet the Need for Affordable Housing

Under Chapter 40B, if the total number of low- or moderate-income housing units in a town exceeds 10% of the total housing stock, the "regional need for a low or moderate income housing" is satisfied, and the local zoning board can reject or condition a comprehensive permit application without risk that the decision will be overturned by the HAC. In *Hollis Hills*, the Lunenberg Zoning Board of Appeals (ZBA) argued that market-rate, unsubsidized housing costs in Lunenburg were so low that there simply was no need for more affordable housing. To support its argument, the ZBA introduced voluminous evidence regarding assessed values, sales prices, and time on the market for homes in Lunenburg and selected other towns nearby.

The HAC rejected this argument, both as a matter of law and on the evidence. The legal conclusion was grounded in Chapter 40B's definition of "low and moderate income housing," which emphasizes that such housing must be "subsidized" by a federal or state program. The subsidy is critical, the HAC explained, because it is the subsidy that imposes limits on the affordable unit sales price (initially and on resale), and on the income level of the persons who occupy those units. Only with such restrictions does a new housing unit further Chapter 40B's legislative goal of creating a "long-term solution to the shortage of affordable housing throughout the Commonwealth." Market-rate housing that is merely cheap, but not regulated, fails to address long-range housing needs because, as the *Hollis Hills* developer demonstrated with its own evidence, the price of those units can go up with market demand; they may be uninhabitable or in need of expensive repairs; and they are often expanded after purchase, or

even demolished and replaced by more expensive homes, in either case becoming no longer affordable.

This portion of the *Hollis Hills* decision is of critical importance to Chapter 40B developers throughout the Commonwealth. If the HAC had adopted the ZBA's argument, every developer thinking about a comprehensive permit would have had to consider how fluctuating market conditions in a particular town or region would affect the "need" for affordable housing. Even if it expended the time and resources to do so, a developer would have no way to test the acceptability of its methods or validity of its conclusions until the project was scrutinized at the local level and forced to come before the HAC. The *Hollis Hills* decision means that developers can safely rely on the Department of Housing and Community Development's subsidized housing inventory—which measures a town's progress towards the 10% threshold—as indicating whether housing "need" exists in a particular town.

When to Fear the Municipal Planning Defense

The ZBA also argued that the *Hollis Hills* project was inconsistent with and would undermine the town's long-standing planning objectives. This "planning defense" is not new, but it is arising with more frequency, as more sophisticated municipal counsel have seen the defense as the silver bullet that can kill an otherwise-worthy Chapter 40B project.

The classic planning defense case is S*tuborn Ltd. Partnership v. Barnstable ZBA*, where the HAC decided in 2002 that the waterfront site of the project had effectively been reserved by municipal plans for water-dependent uses. Since *Stuborn*, every Chapter 40B developer has had to worry about whether its project could, on appeal, be deemed inconsistent with local planning efforts. Yet the standards are ambiguous at best, and, because local boards are not required to raise this defense early in the process, the planning defense can be—and usually is—sprung on the developer without notice, after the local hearings have concluded. Such was the fate of the unfortunate developer who proposed housing in an industrial park in Middleborough; three months ago, in *28 Clay Street Middleborough, LLC v Middleborough ZBA,* the HAC held that project to be inconsistent with municipal planning efforts, and upheld the denial of its comprehensive permit.

In *Hollis Hills,* the HAC applied the same standards as in *Stuborn* and *Middleborough*, but reached the opposite conclusion. The HAC found that the developer had demonstrated that Lunenburg's planning efforts were **not** promoting affordable housing, as it claimed; in fact Lunenburg had restricted affordable housing to a very limited number of sites, some of them clearly undesirable, including one adjacent to the former town dump. The Hollis Hills developer also demonstrated that its sewer connections were fully consistent with town sewer planning, despite the ZBA's claims to the contrary. *Hollis Hills* creates no new law on this point, but, by showing how a developer can demonstrate that its project is consistent with municipal planning efforts, it provides further guidance on the application of the planning defense, particularly when contrasted with the recent HAC decision in *Middleborough*.

Chapter 40B Can "Cure" an Alleged Zoning "Infection"

In another reprise of a recent HAC decision, the ZBA also claimed that its denial of the Hollis Hills permit was justified because the site was "infected" by a zoning violation on an adjoining parcel, what had once been under common control (but not in common ownership) with part of the development site. The business then operating on the two parcels had treated them as a single parcel, including when seeking land use permits for the business. When one of the two parcels was sold to the housing developer, setback violations on the remaining parcel become obvious. The ZBA argued that the housing developer was complicit in "zoning misbehavior" by the owner of the adjoining parcel, and that, under the legal doctrine of "infectious invalidity," it could not use the housing parcel for any purpose. The HAC recently discussed the "infectious invalidity" argument for the first time in its July 2009 decision in *Taylor Cove Development v. Andover ZBA*. Click here to see our Client Advisory about that decision.

Knowing that the HAC would leave adjudication of the "infectious invalidity" question to the courts, the *Hollis Hills* developer asked the HAC to **assume** that the housing site was "infected." That allowed the HAC to decide a legal question within its jurisdiction and expertise: are there any health, safety, or other problems created by the "infection" on the housing parcel, or by the zoning violation next door, sufficient to outweigh the need for subsidized housing? The HAC then found that the "legal impediments argued by the Board" are "local requirements" of the sort that the HAC can waive. Here, Hollis Hills' only use of that portion of its site was for an underground connection to the municipal sewer system, which created no health or safety issue. So the HAC waived any "infection" on the project site, leaving it to the town to deal with the zoning nonconformity on the adjoining parcel.

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Paul D. Wilson and Jonathan M. Cosco of Mintz Levin represented Hollis Hills, LLC in its application before the Lunenburg Zoning Board of Appeals and its subsequent appeal to the Housing Appeals Committee. If you have questions about this decision, please contact Paul or Jonathan.

For assistance in this area,
please contact Jonathan Cosco
or Paul Wilson, or one of the other attorneys in Mintz Levin's
Housing Practice Group.

Daniel O. Gaquin
Group Co-Chair (Real Estate)
617.348.3098
DGaquin@mintz.com

Marilyn Newman
Group Co-Chair (Environmental)
617.348.1774
MNewman@mintz.com

Paul D. Wilson
Group Co-Chair (Litigation)
617.348.1760
PWilson@mintz.com

Dean Atkins
617.348.1853
DAtkins@mintz.com

Allan Caggiano
617.348.1705
ACaggiano@mintz.com

Jonathan M. Cosco
617.348.4727
JCosco@mintz.com

Nicholas C. Cramb
617.348.1740
NCramb@mintz.com

Jeffrey A. Moerdler
212.692.6881
JMoerdler@mintz.com

Gabriel Schnitzler
617.348.3099
GSchnitzler@mintz.com

Noah C. Shaw
617.348.1795
NShaw@mintz.com

Jennifer Sulla
617.348.3092
JSulla@mintz.com

Benjamin B. Tymann
617.210.6853
BTymann@mintz.com