MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

Housing Advisory: Supreme Judicial Court Issues Two Decisions about When Towns Can Litigate Their Compliance with Chapter 40B's Thresholds

6/5/2008

On May 27, 2008, the Massachusetts Supreme Judicial Court (SJC) issued two decisions, both involving a town's desire to receive a ruling from the courts as to whether the town had met Chapter 40B's statutory threshold of 10% of overall municipal housing stock qualifying as subsidized housing. When a town has met the 10% threshold, it is free to deny a Chapter 40B comprehensive permit application, and will not be overturned on appeal. In each of these recent decisions, *Hingham v. Department of Housing and Community Development* and *Wrentham v. West Wrentham Village*, the SJC held that the towns were not entitled to a judicial ruling on the 10% question because neither town had met the prerequisite of first exhausting its administrative remedies at the Department of Housing and Community Development (DHCD) by getting a final ruling from the agency's adjudicative body, the Housing Appeals Committee (HAC), on the question.

In the *Hingham* case, the Hingham Zoning Board of Appeals (ZBA) approved a comprehensive permit for a large continuing care retirement community (CCRC). The development included 1,750 rental units, all of which the town believed would be counted on DHCD's Subsidized Housing Inventory (SHI), the state's official tally sheet of whether towns have reached the 10% threshold. Adding 1,750 units to Hingham's SHI would put it well over 10% and enable the town to say "no" to future 40B proposals. But DHCD disappointed the town by only counting 25% of the development's 1,750 rental units on the SHI. This left the town well short of the 10% threshold and prompted the town's Superior Court lawsuit against DHCD to challenge the decision.

The SJC, affirming the Superior Court, ruled that Hingham had failed to exhaust its administrative remedies by receiving a final agency decision on the 10% question. DHCD's decision to count only 25% of the rental units on the SHI was not final; DHCD's own regulations call for the HAC to decide whether or not a town has met the 10% threshold (while providing a presumption of validity to the SHI). The town cannot get to the HAC independently, because Chapter 40B establishes that avenue only for a developer's appeal upon a ZBA's denial of the developer's comprehensive permit application (or upon a ZBA's approval with uneconomic conditions). But neither do the statute nor DHCD regulations establish a town's direct right of appeal to the courts on the question of whether it has met the 10% threshold. So, upon a ZBA's denial of a comprehensive permit application on the ground that the 10% threshold has been met, the developer's appeal to the HAC will allow the town to make its case there, and, if the HAC disagrees, to challenge the final HAC decision in the courts. Of course, in Hingham's case, there was no HAC route of appeal available on the particular CCRC project at issue (the ZBA having approved the developer's application and the developer not having appealed to the HAC), so if the town wishes to test the DHCD decision on calculating the SHI, it will need to do so at the HAC upon a future ZBA denial of a comprehensive permit application (and resulting developer appeal), and *then* go to the courts if it loses at the HAC.

The *Wrentham* case presented the same issue, but this time arising during an HAC hearing. The Wrentham ZBA summarily denied a comprehensive permit application on the ground that the town had met its 10% threshold. To reach this result, the ZBA counted as subsidized housing more than 300 beds at a Department of Mental Retardation (DMR) facility. The developer appealed the ZBA's summary denial to the HAC, which ruled that the DMR housing did not count, and so Wrentham had not reached the 10% threshold. The HAC issued a nonfinal remand order instructing the ZBA to proceed with a hearing on the merits of the application. Rather than doing so, the ZBA filed a declaratory judgment lawsuit in Superior Court, which dismissed the lawsuit. As in the *Hingham* decision, Justice Ireland (who authored both SJC decisions) wrote that the agency decision was not final and the town therefore had failed to exhaust its administrative remedies, a prerequisite to obtaining relief from the courts.

In both *Hingham* and *Wrentham* the town plaintiffs argued that allowing an interlocutory appeal on the key question of a town's achievement of the 10% threshold would promote the efficient disposition of applications—why wait until the entire ZBA and HAC processes have run their course if a town can know at the outset of a local hearing that it can reject the application with impunity? The *Hingham* court answered that, on the contrary, "the lengthy delays inherent in permitting independent litigation of the SHI calculations would … impede the construction of low or moderate income housing, thus thwarting the purpose of G.L. c. 40B." And the *Wrentham* court added that Chapter 40B is not about helping towns find expeditious ways to *turn down* applications, but rather "*regardless [of] whether a town has satisfied its minimum housing obligation* [the ZBA] must hold a comprehensive hearing that evaluates the permit application" on its merits (emphasis added).

Both the *Hingham* and *Wrentham* cases were litigated in the lower courts without the benefit of new DHCD regulations promulgated earlier this year creating a new procedure a zoning board can use to get a quick decision from DHCD and the HAC—but not the courts—on whether the town has met the 10% threshold (or the other statutory thresholds and regulatory safe harbors that shift greater authority to towns to deny an application). The new regulations, at 760 CMR 56.03(8), provide for a speedy decision by DHCD on such questions, at the outset of a local hearing, if the town thinks there will be a live issue about its compliance with a statutory or regulatory safe harbor. Of course, getting a quick DHCD decision on its compliance with the 10% goal only addresses part of the issue for the town. The other thing that matters to the town is how and when it can appeal an adverse ruling on that question. The new regulations have provided *some* help to towns in that regard by creating (at 760 CMR 56.03(8)(c)) an expedited appeal to the HAC of DHCD's determination. After the HAC ruling, however, the new regulations say the same thing the SJC did in *Wrentham*: a town unhappy with that HAC ruling must wait for the end of the full administrative proceeding to go to court, by appealing the final HAC decision, not this interlocutory one.