Housing Advisory: Affordable Housing Litigation: Life after the Supreme Judicial Court

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Over several months in 2007-2008, the Supreme Judicial Court (SJC) issued nine decisions under Chapter 40B, the Commonwealth's affordable housing law—more cases than it had decided in the prior decade. While it is common to think of the state's highest court as the last stop for litigation, some of the housing developments at issue in those SJC cases continued to be litigated in the lower courts, either on remand from the SJC or by neighbors bringing more lawsuits after losing in the first round of litigation. We thought it might be fun (for our readers, if not for the developers) to report on the later progress of those cases, and the amusing claims that surfaced there.

The "Your Development Will Put the Town *Too* Far Over 10%" Argument

The SJC's 2008 decision in *Canton Zoning Board of Appeals v. Housing Appeals Committee* treated the question of what happens if the town reaches statutory safe harbor of 10% affordable units while an appeal is pending. The SJC ruled in *Canton* that such pending appeals must continue; if the town had not reached the 10% statutory threshold when the application was before the Zoning Board, it could not put a stop to that developer's appeal by later granting another permit that put the town over 10%. An inevitable effect of this rule was that the *Canton* permit appeal working its way through the Housing Appeals Committee (HAC), if ultimately successful, would allow the creation of subsidized housing units at a time when Canton's supply of such units already exceeded 10%.

When Chapter 40B was young, the SJC had ruled that, in a town already near the 10% safe harbor, an applicant need not limit his proposal to exactly the number of units that would bring the town to 10%; the applicant was allowed to present a proposal that would cause the town's stock of subsidized housing to exceed 10% by a "reasonable" number of units. Seizing on this language, the Canton Zoning Board argued on remand from the SJC that, because Canton's level of subsidized housing was already at 12.6% (because of the approval of the other development unsuccessfully cited by Canton in the 2008 SJC case) even before the construction of the development, approval of that development would result in "an unreasonable overage," and so the Board's denial should be upheld for that reason. In other words, a decision that caused the town to reach 10%, but too late to stop a development already on appeal at the HAC, might *not* be too late after all if it put the town's percentage of subsidized housing north of 12.6% instead of, say, at 10.1%. In March of this year, the Appeals Court rejected that argument, so the Canton developer prevailed on his second trip to the appellate courts.

The "Chapter 40B Is Bad Law" Argument

The proposed development at issue in a 2007 SJC case, *Boothroyd v. Zoning Board of Appeals of Amherst*, was further litigated as well, in not one but two lower courts. *Boothroyd*, like *Canton*, also concerned what happens when a town reaches the 10% magic number, but the case concerned the effect on a future application, not a pending one as in *Canton*. In the 2007 SJC case, neighbors argued that the Zoning Board was forbidden to grant a comprehensive permit if the town's subsidized housing stock exceeded 10% before the developer applied for that permit. The SJC rejected this argument; while attaining the 10% level allowed a town zoning board to deny future applications without fear of developer appeal, the SJC said, it did not prohibit a zoning board from voluntarily granting a permit if it found additional housing need.

Rebuffed by the SJC, the neighbors went to the lower courts. First they sued the Conservation Commission for failure to review the proposed development under the local wetlands bylaw. Not surprisingly, the Superior Court ruled that the Chapter 40B *comprehensive* permit included the necessary approval under the local wetlands bylaw. The neighbors appealed that decision, but the Appeals Court affirmed it in 2008 in a decision that took all of two paragraphs. Later, when the Building Inspector granted building permits, the neighbors appealed those permits to the Housing Court and sought an injunction against construction. Citing their long and unsuccessful litigation efforts, the Housing Court found no likelihood that the neighbors would succeed on the merits of their claims—especially their claim that Chapter 40B is "bad law"—and it denied the injunction request on Christmas Eve, 2009.

The "Our Last Appeals Took So Long That Your Permit Expired" Argument

Finally, one lucky development in Lexington was the subject of two of the SJC's 2008 decisions, *Taylor v. Zoning Board of Lexington* and *Taylor v. Housing Appeals Committee,* with the developer prevailing in both cases. (Full disclosure: in the Superior Court, Paul Wilson and Noah Shaw of Mintz Levin represented the developer on certain issues that were not the subject of the appeals to the SJC.) When the developer later obtained a pre-construction modification of the comprehensive permit, neighbors appealed the modification, arguing that the 2005 comprehensive permit had lapsed because construction did not commence within three years—because of their *own* appeal of that permit. The Superior Court granted summary judgment in favor of the developer, holding that the three-year period for commencing construction under a comprehensive permit runs only from the date the last appeal is decided or otherwise disposed of. With this latest victory in hand, the developer finally convinced the neighbors to settle, and that development is, at long last, under construction.

As these cases demonstrate, winning in the SJC is preferable to the alternative, but even a victory in the state's highest court might not mean that it is time to break out the shovels.

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