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Supreme Judicial Court Decision Protects the New England Fund, as Well as Other Affordable Housing Subsidy Programs

In a landmark decision that will promote the further production of affordable housing in Massachusetts for years to come, last Friday (July 20, 2007) the Massachusetts Supreme Judicial Court (SJC) rejected a frontal attack on the primary funding program for Chapter 40B projects, the New England Fund (NEF) of the Federal Home Loan Bank of Boston. NEF has been the main engine of subsidized housing production in recent years, producing more than 14,000 units. This latest challenge to the Comprehensive Permit law was embodied in the Town of Middleborough's appeal in the case *Middleborough vs. Housing Appeals Committee*. By asking the SJC to invalidate NEF, a victory by the municipality would have thrown the status of those 14,000+ subsidized units into doubt while eliminating the principal funding source for pending and future Chapter 40B projects, thereby drastically reducing subsidized housing production in Massachusetts.

In *Middleborough*, the SJC not only turned back the town's argument but, as importantly, rejected language in the Appeals Court's 2006 decision in the case that had construed quite narrowly what constitutes a valid Chapter 40B subsidy in general. Instead, the SJC explicitly adopted the Housing Appeals Committee's (HAC) established definition of a Chapter 40B subsidy, and its treatment of NEF specifically, as set forth in the HAC's 1999 *Stuborn* decision.

Middleborough had contended that NEF did not meet the statutory requirement under Section 20 of Chapter 40B of a program providing "housing subsidized by the federal or state government." In 2000 the town's zoning board rejected the New Bedford-based developer's plans for 10 single-family homes on a four-acre parcel. The developer appealed that decision to the HAC, which overturned it and ordered the Zoning Board of Appeals to issue a permit. In the town's

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subsequent appeals to the Superior Court and the Appeals Court, the courts sided with the developer, and also confirmed the NEF as a valid Chapter 40B subsidy program, though the Appeals Court did so in the narrow language that drew the concern of affordable housing advocates and developers.

Such programs as the Local Initiative Program (LIP) and others offering non-monetary technical assistance were at risk by either a reversal at the SJC or even a decision that upheld the Appeals Court's result but allowed the lower court's restrictive language defining a Chapter 40B subsidy to stand. By validating the more expansive *Stuborn* definition, however, the SJC secured the future vitality of NEF, LIP and other popular Chapter 40B subsidy programs—at least in the courts.

* * * * *

Paul D. Wilson and Benjamin B. Tymann of Mintz Levin's Housing Practice Group coauthored and filed a brief with the SJC supporting NEF, LIP and the Stuborn standard on behalf of Citizens' Housing and Planning Association, MassHousing and the Massachusetts Housing Partnership. The firm represented the organizations pro bono.

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