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Housing Advisory: SJC Issues Two Decisions Concerning When to Count to 10% under Chapter 40B

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Chapter 40B says that once a municipality is deemed by the Department of Housing and Community Development (DHCD) to have 10% or more of its overall housing stock comprised of "countable" subsidized housing, the city or town may then deny a new comprehensive permit application without fearing a developer appeal. But what happens when a city or town reaches the magic 10% threshold *after* the zoning board of appeals (ZBA) issues its decision (either a denial or an approval with conditions) and the developer is in the midst of its appeal of the decision? Two different state trial court judges gave opposite answers to that question, but now the Supreme Judicial Court (SJC) has resolved that split in authority. The SJC has ruled that a town's later satisfaction of the 10% test does not mean that other applicants already appealing ZBA decisions are out of luck.

In *Zoning Board Appeals of Canton v. Housing Appeals Committee*,[1] one Superior Court judge said that the reaching of the 10% threshold kills any subsidized housing proposal then under appeal because the Housing Appeals Committee (HAC), which adjudicates Chapter 40B developers' appeals, automatically "loses its jurisdiction" upon the town's satisfaction of the 10% threshold. But in *Taylor v. Housing Appeals Committee*,[2] a second Superior Court judge ruled that the developer on appeal was saved from the project death sentence imposed by the town's achievement of the 10% threshold so long as town was below 10% at the time the ZBA decision under appeal was issued.

DHCD regulations and HAC precedent had adopted that very rule, and the second Superior Court decision, *Taylor*, found the rule was fully consistent with Chapter 40B. After all, a primary purpose of that statute is to counteract subsidized housing opponents' historical practice of upending unpopular proposals through delay and manipulation. The DHCD and HAC counting rule, therefore, provided a measure of protection to developers from the danger of "dueling applications," by preventing a ZBA from extinguishing an applicant's appellate rights in mid-appeal by later approving another 40B application that puts the town over 10%.

The divergent *Canton* and *Taylor* cases were each appealed to the Supreme Judicial Court. On April 11, the SJC issued its opinions in both cases, finding that the judge in the second case, *Taylor*, got it right. "DHCD's choice of the date of filing of the [ZBA]'s decision [as the time of calculating the town's compliance with the 10% threshold] is neither irrational nor inconsistent with the statute," stated the SJC in *Canton*, echoing its holding in *Taylor*. Because the counting rule "may be reconciled with" the language and intent of Chapter 40B, the *Taylor* court said, it is valid, adding, "[the rule] reflects a history of reasonable policy decisions made by HAC and DHCD."

The Supreme Judicial Court's *Canton* and *Taylor* decisions will not necessarily put an end to future challenges to the DHCD and HAC counting rule, however, because the rule has now changed under the new DHCD regulations promulgated on February 22, 2008 (after SJC oral arguments in the *Canton* and *Taylor* cases, which were argued along with five other Chapter 40B cases on February 4 and 5[3]).

The current rule is the same one that was in effect from 1991 to early 2003, *i.e.*, "a decision by a [ZBA] to deny a Comprehensive Permit, or…grant a Comprehensive Permit with conditions, shall be upheld if [any of the statutory minima, including the 10% threshold] has been met *as of the date of the Project's application* [to the ZBA]."[4] While, in *dicta* (judicial commentary in a decision that is not binding precedent), the SJC's *Taylor* decision spoke favorably of the agencies' 2003 shift of the counting rule from "date of ZBA application" to "date of ZBA decision"—saying DHCD and HAC were properly attempting to "strike a balance" between promoting subsidized housing and allowing a degree of municipal zoning control—the SJC's decision is really grounded on the idea that it is DHCD's prerogative to choose any reasonable date as the time at which an applicant becomes grandfathered against the town's later reaching 10%. Nevertheless, only time will tell whether legal challenges lie ahead for the current rule.

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[1] Norfolk Superior Court (Nov. 10, 2006) (Grabau, J.).

[2] Suffolk Superior Court (Apr. 9, 2007) (Kottmyer, J.).

[3] *See* "Supreme Judicial Court to Hear Seven Housing Cases in February," Mintz Levin Housing Alert (Jan. 30, 2008).

[4] 760 CMR 56.03(1) (emphasis added).
