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The SJC's Chapter 40B Session: Wrestling with the "Plain Language" of Chapter 40B

In its February, 2008 session, the Supreme Judicial Court (the "SJC") devoted extraordinary attention to a single statute, hearing seven cases arising under G.L. c. 40B, §§ 20-23 ("Chapter 40B"). Although it cleared away some underbrush that could impede Chapter 40B development, in two cases the SJC felt constrained by what it considered the "plain meaning" of the statutory language to reach conclusions less supportive of Chapter 40B's primary goal: facilitating the development of affordable housing.

Chapter 40B at a Glance

Chapter 40B is the Commonwealth's primary tool for fostering affordable housing. (As of October, 2007, over 48,000 dwelling units had been built statewide under Chapter 40B, including approximately 26,000 affordable units.¹) The Legislature enacted Chapter 40B in 1969 to alleviate "an acute shortage of decent, safe, low and moderate cost housing" in the Commonwealth caused by restrictive local zoning and land use controls and the "protracted" process of obtaining local approvals for constructing housing.² To address these twin obstacles, Chapter 40B created a streamlined process that allows for the override of local controls. Under Chapter 40B, qualified applicants may bypass the process of obtaining permits from various local authorities and instead apply to local zoning boards of appeals ("ZBAs") for a single, "comprehensive" permit; and ZBAs may override local controls after weighing enumerated needs, including the regional need for affordable housing.

ZBA decisions on comprehensive permit

applications may be appealed in two ways. Under § 21 of Chapter 40B, "any person aggrieved" by a permit grant may appeal directly to court for *de novo* review. Under § 22, when a ZBA either denies a permit or grants one with conditions rendering the proposed project "uneconomic," the applicant may appeal, also for *de novo* review, to the state Housing Appeals Committee ("HAC") within the Department of Housing and Community Development ("DHCD"); HAC's decision is then subject to judicial review under the Administrative Procedure Act, Chapter 30A.

Chapter 40B also specifies minimum affordable housing obligations for municipalities, particularly a 10% requirement that acts as a safe harbor for municipalities. Until affordable units comprise 10% of a municipality's housing stock, ZBA permit denials are subject to HAC override. Once a municipality reaches 10%, however, HAC can no longer override denials for being inconsistent with local needs.³

Nearly Forty Years of Appellate Litigation

As a principal draftsman of Chapter 40B has observed, the statute "suffers from vagueness and even obscurity."⁴ Accordingly, it has given rise to numerous SJC decisions, as litigants have wrestled over the meaning of the statute's language and purpose and the interrelationships between the statute's provisions. From the earliest SJC decision on Chapter 40B in March, 1973 (*Hanover*) to the latest one in June, 2008 (*Board of Appeals of Woburn v. HAC*, discussed below), the main fault line running through this jurisprudence has been the tension between implementing the

statute to facilitate the development of affordable housing and preserving some local autonomy, the exercise of which may impede such development. This fault line continued to be evident in the seven Chapter 40B decisions of the SJC's February, 2008 session.

Taylor II: Addressing the "Dual Appeal" Problem

Taylor v. Board of Appeals of Lexington ("Taylor II")⁵ arose from Chapter 40B's unusual dual-appeal system. In *Taylor II*, the SJC addressed, for the first time, what happens when a ZBA issues a permit and there are simultaneous appeals by the applicant to HAC and by aggrieved persons to court.

Taylor II concerned a developer's application to build 36 units of affordable housing in Lexington. When the ZBA granted the permit, but for only 28 units, the developer appealed to HAC on the ground that permit conditions made the project uneconomic. Simultaneously, abutters appealed to Superior Court, which allowed an assented-to motion to stay the abutters' appeal pending the outcome of the HAC appeal. In that appeal, HAC found in favor of the developer and directed the ZBA to issue an amended permit for 36 units.⁶ The developer then moved for summary judgment in the Superior Court action because the original permit for 28 units was no longer operative. The court agreed and granted summary judgment. The abutters appealed, arguing that they were entitled under Chapter 40B to *de novo* review of the permit they had challenged, not just deferential Chapter 30A review of the permit as amended by HAC's action. The Appeals Court agreed with the abutters and reversed the Superior Court.

On further appellate review, the SJC affirmed the Superior Court's decision, but in a complex decision the full import of which remains to be seen. The SJC agreed that HAC's decision had rendered the original permit, and the abutters' appeal of it, moot. The SJC concluded, however, that if the abutters had filed a timely appeal (which they did not), they could have sought *de novo* review by a court of the amended permit that resulted from HAC's action. The abutters had participated extensively in the HAC appeal, but the SJC ruled that participation in HAC proceedings is not sufficient to protect all the interests of aggrieved persons because, among other things, abutters participate in HAC proceedings only as permitted by the presiding officer. Hence, the SJC held that aggrieved persons may seek their day in court under § 21 even after HAC renders a decision modifying a comprehensive permit.

This conclusion means that a Chapter 40B project can receive two rounds of *de novo* review: a first round by HAC under § 22, and a second round by a court under § 21 after an HAC decision ordering revisions to a comprehensive permit.

Despite the fact, often stated by the SJC, that the primary purpose of Chapter 40B is to facilitate the development of affordable housing, this result could impede rather than facilitate that development. Indeed, the SJC recognized that "the cost of the delay resulting from a [§ 21] challenge to an amended comprehensive permit is significant." It, however, saw no solution consistent with Chapter 40B's "plain language": "ultimately, the anomalies created by the separate appeals require a legislative resolution."⁷

In the end, however, the consequences of the SJC's decision remain unclear. The decision leaves no doubt that the second round of review, by a court, cannot consider matters resolved by HAC: after HAC has adjudicated a developer's appeal, persons still aggrieved by an amended permit may have only their "remaining concerns" addressed in an appeal to court under § 21. This limitation on the scope of review under § 21 is plainly necessary, for otherwise HAC review would serve no useful purpose: there would be little point to expert agency review if a court were simply to ignore the agency's decision and review the same issues *de novo*. That is why § 22 provides for review of HAC decisions only under the deferential standards of Chapter 30A and why the *Taylor II* decision confines court review, under § 21, of amended permits resulting from HAC proceedings to "remaining concerns," if any. The limited scope of court review allowed under *Taylor II* thus may well limit the decision's practical implications, but precisely how remains to be seen, as the decision does not make clear the meaning of "remaining concerns." The decision is likely to affect strategy in HAC proceedings: when more "concerns" are addressed in such proceedings, fewer "remain."

Woburn: HAC Review of "Uneconomic Conditions"

In *Board of Appeals of Woburn v. HAC*,⁸ the SJC relied on the plain language of Chapter 40B again, this time to deny HAC authority to modify or remove permit conditions for a Chapter 40B project when a developer fails to show that a ZBA's decision has rendered the project uneconomic. The developer in Woburn had applied for a permit to build 640 units on a 75-acre parcel in Woburn. The Woburn ZBA formally approved the application, but for only 300 units, and the developer appealed to HAC. HAC ordered the number of units increased to 420 because the ZBA's reduction was arbitrary. HAC took this action despite its agreement with the ZBA that a 640-unit project was too large and the developer's failure to show that reducing the number of units by over 50% rendered the project uneconomic.

On appeal of the HAC decision to Superior Court, the judge ruled that the ZBA decision, with its substantial reduction in the project's size, was a "de facto denial" to be reviewed under

the standard for permit denials, under which standard there is no need to show that permit conditions are uneconomic. The judge remanded the case to HAC, which determined on remand that the appropriate number of units was 540.

When the ZBA appealed, the SJC held that HAC had exceeded its authority. Under the “express language” of § 23, the SJC ruled, HAC may not revise a permit granted by a ZBA unless the ZBA’s decision both makes the project uneconomic and is not “consistent with local needs.” Once the developer failed to show that permit conditions were “uneconomic,” HAC’s analysis should have ended—even if the ZBA provided no basis for the substantial reduction in project size. When a developer fails to show “uneconomic” conditions, HAC lacks authority to play Goldilocks to determine the just-right number between the too-large number proposed by the developer and the too-small number approved by the ZBA.

The SJC rejected the argument that the ZBA, despite issuing a decision labeled an approval, had issued a de facto denial and that to hold otherwise would be to privilege form over substance. The SJC acknowledged HAC’s argument that communities were “imposing, as conditions of approval, size limitations that are discouraging the development of needed affordable housing” but determined that the practice could not be remedied consistent with statutory language by treating size limitations as de facto denials, “thereby eliminating the uneconomic element of the *prima facie* case for relief.” A possible remedy, it suggested, might lie in administrative regulations that address the meaning of “uneconomic” and provide a basis for determining that substantial size limitations are “uneconomic.” In a separate opinion, Chief Justice Marshall concurred in the result but “only because [DHCD]... has not promulgated regulations to address the issue presented in this case.”⁹ Regulations that took effect between oral argument and the decision and post-decision changes to DHCD guidelines address this issue.

Taylor I and Canton: Determining When the 10% Requirement Has Been Satisfied

In *Taylor v. HAC* (“*Taylor I*”) and *Zoning Board of Appeals of Canton v. HAC*,¹⁰ the SJC rejected challenges to an administrative regulation establishing the date for determining whether, for purposes of insulating a ZBA decision from HAC override, a municipality had satisfied its 10% minimum affordable housing obligation. The regulation established the date of the ZBA decision as the date of reckoning. Abutters to a Chapter 40B project in *Taylor I*, and the Canton ZBA in *Canton*, argued that notwithstanding the deference owed to administrative regulations, this date was too early. In these cases, the ZBAs issued permit decisions when the respective towns—Lexington and

Canton—were below 10%, but the towns reached 10% while appeals of those decisions were pending before HAC. The Lexington abutters and Canton ZBA argued that, as a result of the towns’ reaching 10% during the pendency of the appeals, HAC could no longer hear the appeals; holding otherwise, they argued, would “skew the ... delicate balance” Chapter 40B struck between fostering affordable housing and municipal autonomy too far in favor of the former and against the latter.

The SJC rejected this argument. Because Chapter 40B leaves the timing issue open, the question is whether the regulation promulgated to spell out this detail may “be reconciled with the governing legislation.” The SJC answered affirmatively, noting that an earlier regulation constrained municipal autonomy even more by using an even earlier date: under the older regulation, if a municipality had not reached 10% on the date of application for a permit, the municipality could not rely on the 10% safe harbor. The currently applicable regulation, 760 CMR 56.03, reinstates this earlier date.

Hingham and Wrentham: Exhausting Administrative Remedies

In *Hingham v. DHCD* and *Wrentham v. West Wrentham Village, LLC*,¹¹ the SJC relied on administrative law principles to hold that municipalities could not, respectively, (1) seek a declaratory judgment concerning a DHCD decision that only some units in a Chapter 40B project—not enough for the plaintiff Town to reach 10%—would be included on the Subsidized Housing List (“SHI”), which measures progress toward 10%; and (2) seek a declaratory judgment that a town had reached 10%. In both cases, the SJC held that the plaintiff had failed to exhaust its administrative remedies.

In *Hingham*, the SJC noted that SHI calculations are not formally binding on HAC and that the plaintiff Town could not challenge the SHI calculation until such time as a permit applicant appealed from a ZBA to HAC; it is in the HAC proceeding that the Town can challenge the SHI calculation and present evidence that it had reached 10%. In *Wrentham*, the Wrentham ZBA denied a comprehensive permit based solely on its determination that Wrentham had reached 10%. HAC remanded the matter to the ZBA because, it concluded, the ZBA had erred in counting certain accommodations for mentally disabled persons toward the 10% threshold. The Town then sought judicial review in Superior Court rather than hold a hearing on the merits of the permit application. The SJC held that the Town could not seek this review because HAC’s remand order was not final administrative action and not appealable.

Groton: HAC May Not Override Property Rights

*Zoning Board of Appeals of Groton v. HAC*¹² concerned a ZBA

denial of a permit based, in part, on traffic hazards caused by poor sight lines. When the developer appealed to HAC, HAC determined that the hazards could be remedied by regrading and clearing vegetation on municipal property. HAC directed the ZBA to grant the permit and the municipality to grant the developer an easement to regrade and clear vegetation on the municipal property. The SJC held that HAC lacked authority under Chapter 40B to order a municipality to convey an easement.

Conclusion

By hearing so many Chapter 40B cases in its February, 2008 session, the SJC created an unusual focus on the statute and

some of its areas of “vagueness” and “obscurity.” From *Hanover* in 1973 through such recent cases as *Zoning Board of Appeals of Wellesley v. Ardmore Apts. Ltd. P’ship* and *Middleborough v. Housing Appeals Committee*,¹³ the SJC has acted to resolve statutory ambiguities under Chapter 40B. In *Taylor II* and *Woburn*, however, the SJC found difficulties that it concluded it could not resolve consistent with Chapter 40B’s “plain language.” Instead of construing the statute in a manner consistent with its overarching objectives, the SJC suggested that legislative and administrative actions may be more appropriate tools for advancing those objectives. ■

Endnotes

1 See Citizens’ Housing and Planning Association, “Fact Sheet on Chapter 40B,” available at <http://www.chapa.org/pdf/40BFactSheetOctober2007.pdf>.

2 *Bd. of Appeals of Hanover v. Housing Appeals Committee (“Hanover”)*, 363 Mass. 339, 351 (1973).

3 G.L. c. 40B, § 20.

4 Allan G. Rodgers, “Snob Zoning in Massachusetts,” 1970 ANN.SURV.MASS.LAW 487, 489.

5 451 Mass. 270 (2008). *Taylor II* followed the decision in the related case of *Taylor v. HAC*, 451 Mass. 149 (2008) (“*Taylor I*”), discussed below.

6 The abutters’ Chapter 30A appeal of the HAC decision was the subject of *Taylor I*.

7 451 Mass. at 279.

8 451 Mass. 581 (2008).

9 451 Mass. at 594 n.24 and 595, respectively.

10 451 Mass. 149 (2008) and 451 Mass. 158 (2008), respectively.

11 451 Mass. 501 (2008) and 451 Mass. 511 (2008), respectively.

12 451 Mass. 35 (2008).

13 436 Mass. 811 (2002) and 449 Mass. 514 (2007), respectively. *Middleborough* arguably presents the greatest contrast with *Taylor II* and *Woburn*. *Middleborough* held that financing through the New England Fund of the Federal Home Loan Bank of Boston (“FHLBB”) provides a government subsidy so as to make projects eligible for comprehensive permits despite the fact that the FHLBB is a privately capitalized and owned corporation managed independently of the federal government; the SJC based its holding on several factors other than Chapter 40B’s “plain language,” including the statute’s “broadly meliorative purpose.”

Save These Dates!

John & Abigail Adams Benefit Ball
Saturday, January 24, 2009

13th Annual Superior Court Bench Meets Bar Conference
Thursday, February 26, 2009

19th Annual Bankruptcy Bench Meets Bar Conference
Thursday, May 14, 2009

Justice is Sweet
Thursday, June 25, 2009