

Housing Alert: Supreme Judicial Court to Hear Seven Housing Cases in February

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Next week will be a historic occasion for the housing community in Massachusetts. Over a two-day period (February 4 & 5), the state's highest court will hear arguments in no less than seven cases arising under the state's affordable housing law, Chapter 40B – approximately the same number of Chapter 40B cases decided by the Court over the last decade. The result is likely to be more clarity for towns, developers, state agencies and neighbors about how to work with this sometimes opaque statute.

The seven cases raise a cornucopia of issues concerning how local zoning boards, state agencies, and the lower courts should deal with proposals to build subsidized housing. The cases, and the issues the Supreme Judicial Court (SJC) will consider, are as follows:

- **Town of Hingham v. Dept. of Housing & Community Development**
The SJC will address the question of when and how a municipality can challenge a calculation by the Department of Housing and Community Development of the municipality's compliance with its statutory subsidized housing quota.
- **Board of Appeals of the City of Woburn v. Housing Appeals Committee**
The issue before the SJC is whether the Housing Appeals Committee (HAC) and the lower courts can treat a local "approval" of a comprehensive permit, containing conditions that dramatically reduce the size of the proposed development, as the functional equivalent of a denial.
- **Town of Wrentham Zoning Board of Appeals v. West Wrentham Village, LLC**
This case focuses on a procedural question: If the HAC finds that a town has not reached its 10% statutory subsidized housing quota because certain units counted by the town do not qualify as subsidized housing, can the town board immediately appeal that ruling, or is that appeal premature, as the Superior Court ruled?
- **Taylor v. Lexington Board of Appeals**
There are two *Taylor* cases before the SJC at the same time, each dealing with the same proposed development in Lexington but treating separate issues. Both *Taylor* cases and the following *Canton* case (which shares the same issue as the second *Taylor* case) are consolidated for oral argument.

In this first *Taylor* case, the SJC will determine whether one of the two possible appeals routes from a Zoning Board of Appeals decision provided in Chapter 40B trumps the other. On the one hand, a developer who is unhappy about a Zoning Board of Appeals decision can appeal to the HAC. On the other, a "person aggrieved" by the issuance of a comprehensive permit by the Zoning Board of Appeals may appeal that decision to the courts. In a case where both appeals routes were invoked, the Superior Court held that because the statute mandates that the HAC decision supplants the Board's original decision, the HAC decision in the developer's appeal effectively makes moot the abutters' appeal to the courts.

- **Taylor v. Housing Appeals Committee**
In the second *Taylor* case, the SJC will consider what happens to pending appeals at the HAC (or presumably in the courts) when the town satisfies its 10% affordable housing obligation while those appeals are pending. One Superior Court judge said, in *Taylor*, that a developer already before the HAC can continue his appeal, but another Superior Court judge, in the *Canton* case listed below, ruled that the HAC was deprived of jurisdiction over pending appeals when the town reached 10%.
- **Zoning Board of Appeals of Canton v. Housing Appeals Committee**
The *Canton* case presents an identical issue as the second *Taylor* case.
- **Groton Zoning Board of Appeals v. Housing Appeals Committee**
In this appeal, the SJC will consider whether the HAC's authority to stand in for local bodies that issue approvals for a subsidized housing development includes the power to order a town department to convey an easement over town property.

Paul Wilson and Ben Tymann of Mintz Levin's Housing Practice Group represent the developer in the Woburn case, which Paul will argue before the SJC. Paul and Ben also represented the developer before the SJC in *Hingham Planning Board v. Hingham Campus LLC*, 438 Mass. 364 (2003), the original litigation over the Hingham development now the subject of the current disagreement between the Town and DHCD described above. And Paul and Noah Shaw have represented the developer of the project involved in the two *Taylor* cases on a limited basis, although not as to the issues being taken up by the SJC.

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If you would like to discuss any of these cases, or for further information about any of them, please contact any member of Mintz Levin's Housing Practice Group listed below.

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