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## Supreme Judicial Court Rules That a Town May Continue to Issue Comprehensive Permits Even After Meeting Its Minimum Affordable Housing Obligation of 10%

In yet another case about what happens when a town meets its minimum affordable housing obligation, the Supreme Judicial Court has held that a zoning board of appeals has the discretion to continue to grant comprehensive permits under M.G.L. c. 40B, §§ 20–23 if it wishes, even after the town has reached one of Chapter 40B’s minimum subsidized housing goals. The court thus rejected abutters’ claims that because 10% of the town’s housing units already qualified as subsidized housing, the affordable housing developer could only obtain relief from local zoning by obtaining a variance.

In *Boothroyd v. Zoning Board of Appeals of Amherst*, SJC-09896 (Mass. June 14, 2007), the defendant developer applied for a comprehensive permit at a time when Amherst had fulfilled its minimum affordable housing obligation under Chapter 40B. The zoning board decided that Amherst nonetheless still needed affordable housing, citing testimony that the vacancy rate in town was 1% and that 870 families were on the Amherst Housing Authority waiting list, having to wait three to six years for an affordable housing unit. Concluding that the overwhelming need for affordable housing outweighed concerns about density, traffic and other “constraints imposed by the zoning bylaw,” the board issued a comprehensive permit.

On appeal, the abutters conceded that the language of Chapter 40B allows a subsidized housing developer to obtain relief from local zoning requirements after a town reaches the 10% goal—but only, they argued, by obtaining a conventional special permit or variance.

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In rejecting this reading of Chapter 40B’s touchstone phrase, “consistent with local needs,” the Supreme Judicial Court returned to its oft-repeated theme that the less-than-clear provisions of Chapter 40B should be construed “in connection with the purpose of its enactment and as a harmonious whole.” That purpose, the court emphasized, was to provide affordable housing, and the legislature had decided that “local interests”—including local zoning laws—“must yield to the general public need for housing.” Thus, the court ruled, Chapter 40B did not relegate post-10% applications to the local special permit or variance procedure.

A municipality’s attainment of its minimum affordable housing obligation in many cases does not eliminate the need for affordable housing within its borders, the court noted, and so a zoning board should be free to address that need by continuing to issue comprehensive permits. This interpretation of Chapter 40B protected local autonomy, the court said, because once a town reaches 10%, its zoning board is not required to grant a comprehensive permit; if the board chooses instead to apply its local zoning laws, the developer cannot appeal that now-discretionary decision to the Housing Appeals Committee.

*Boothroyd* ratifies a common practice of zoning boards in a few towns that, like Amherst,<sup>1</sup> long ago reached a statutory threshold. And the decision provides welcome guidance as more and more towns approach those thresholds.

As readers of our Housing Advisories know, a related legal issue is also percolating through the appellate courts: if a town reaches 10%, and looks less favorably than Amherst on affordable housing, is it entitled to a dismissal of all pending developer appeals of comprehensive permit denials that pre-dated the town’s reaching the threshold? *See* Mintz Levin Housing Advisory, *New Superior Court Decision Creates Split in Authority about What Happens to Pending Appeals when Town Reaches 10% Subsidized Housing Threshold* (April 26, 2007). *Boothroyd* preserves a town’s right to be *more* generous concerning affordable housing than Chapter 40B requires. It will be interesting to see where the appellate courts draw the line at the other extreme, as they decide if a town can call a halt to all past, present and future subsidized housing applications on the day it reaches 10%.

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<sup>1</sup> Nearly 20 years ago, Mintz Levin’s Paul Wilson obtained an Amherst comprehensive permit (from the Housing Appeals Committee, on appeal) that put Amherst near the 10% level.

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