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## Housing Appeals Committee Decides Important Policy Question, Telling Municipal Boards of Appeals Not to Invade the Province of State Subsidizing Agencies

For some time, the Massachusetts Housing Appeals Committee (HAC) has been noting in its decisions that it had an important policy question under consideration concerning the breadth of the authority of local boards over comprehensive permit applications under G.L. c. 40B ("Chapter 40B"). Now, after obtaining input from two state subsidizing agencies as to that policy question, the HAC has issued a decision that clarifies the types of permit conditions that may be locally imposed. Specifically, the decision, entitled *Attitash Views, LLC v. Amesbury Zoning Bd. of Appeals*, No. 06-17 (Housing Appeals Comm. Oct. 15, 2007), states that "programmatic" aspects of a comprehensive permit project belong solely within the purview of state-level Chapter 40B subsidizing agencies, and that local boards should not tread upon these areas when conducting their review or attaching permit conditions. Instead, the board of appeals' review, and the permit conditions it seeks to impose, should be confined to

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health, safety, or planning concerns.

Over the past several years, some boards of appeals, when granting permits for the approval of Chapter 40B proposals, have taken to attaching conditions to permits having nothing to do with the health, safety and planning concerns that are properly within the municipal bailiwick. For example, town-imposed conditions would specify who was eligible to occupy the subsidized units, or how the housing could be marketed, or even, in extreme cases, how much profit the developer could make and how that profit was to be calculated. All of these issues are traditionally regulated by the state subsidizing agencies.

In two HAC cases — the *Amesbury* case and a similar developer appeal (still pending) arising from Boxborough — town boards had imposed such “programmatic” conditions, which the developer/applicants were prepared to live with, just to get their permits. However, the subsidizing agency in those two cases, MassHousing, denied final approval to the developments, fearing that if towns could impose programmatic conditions, even by agreement, MassHousing’s state housing programs would soon degenerate into 351 separate local programs, each with its own requirements. The subtext, of course, is that an unfriendly town could impose programmatic conditions that might discourage the construction of mixed-income housing in that town. Stringent profit limitations disincentivizing housing developers from even making a project proposal have been among the objectionable conditions, in Amesbury, Boxborough, and elsewhere.

To assist it with this important policy issue, the HAC sought input from two subsidizing agencies, MassHousing and the Massachusetts Department of Housing and Community Development (DHCD). MassHousing asked Mintz Levin to write a series of amicus briefs expressing its position on the limits of the authority of town boards, and DHCD submitted a brief authored by its General Counsel.

In deciding the *Amesbury* case, the HAC made its position unambiguous: “We conclude that for the most part the [programmatic] functions that the Board would undertake are

functions that, under the statutory scheme, have been reserved for state government.” We expect the HAC to reach a similar conclusion in the forthcoming *Boxborough* case.

Thus the HAC has adopted into its caselaw what DHCD said in a guidance letter issued in 2006 (and discussed in one of our Client Advisories at that time): a local board may not impose conditions that impinge on the regulatory responsibilities of the state subsidizing agency. While this recent decisional law of the HAC may not entirely stop boards of appeals from imposing improper permit conditions that invade the province of state subsidizing agencies, it will at least provide developers with a ready defense to contest such conditions.

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*Paul D. Wilson and Benjamin B. Tymann of Mintz Levin’s Housing Practice Group co-authored the amicus briefs referenced above on behalf of MassHousing. For more information about these cases, please contact Paul or Ben. For more information about Mintz Levin’s Housing Practice Group generally, please contact any of the Practice Group attorneys listed below.*

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