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Housing Alert

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The Supreme Judicial Court Declares that Inexpensive Market-Rate Housing May Not Be Counted in Determining a Town's Compliance with Chapter 40B

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On Tuesday, in *Zoning Board of Appeals of Lunenburg v. Housing Appeals Committee,* the Supreme Judicial Court soundly rejected a zoning board of appeals' argument that inexpensive market-rate homes may be counted toward a town's affordable housing obligations under Chapter 40B.

The board contended that a developer could not invoke Chapter 40B even though only 1.9% of Lunenburg's housing stock was recognized by the state as subsidized housing — because, the board argued, cheap market-rate homes already met what Chapter 40B calls the "regional need for low and moderate income housing."

On appeal to the state's highest court, Nick Cramb of Mintz Levin successfully argued on behalf of the developer that the legislature defined "low and moderate income housing" as housing subsidized through a government program for good reason: subsidized housing ensures the longevity of affordable prices as well as the safety and quality of the affordable housing units. The Supreme Judicial Court agreed, explaining that "market-rate housing, by definition, fails to meet the subsidy, use restriction and affirmative fair marketing plan requirements." The court went on to state that market-rate housing "cannot provide uniformity… or guarantee minimum standards of quality necessary for long-term affordability… there is no guarantee that housing currently priced within the range targeted to income eligible families will be ultimately occupied by them, or that it will remain affordable." As such, "evidence of low cost market-rate housing cannot be factored into the consideration of the regional need for affordable housing."

The court also dispatched the town's other arguments, finding that: (1) although Lunenburg had completed affordable housing and sewer planning, it had yet to generate any affordable housing under its plan, and Hollis Hills' project would not undermine the town's master plans; (2) a zoning violation on a neighboring plot — that might have "infected" one of Hollis Hills' parcels pursuant to a doctrine known as "infectious invalidity" — was insufficient to outweigh the need for affordable housing; and (3) the board's argument that the underlying decision by Housing Appeals Committee was invalid because one of its seats had not been filled by the governor was meritless: "Three members of the [Committee] may decide an appeal."

This is an important decision for developers. A contrary ruling would have made the application of Chapter 40B a function of geography; the law would apply in expensive Boston suburbs, but not in counties where housing prices are lower. The application of Chapter 40B would also have become a function of market timing as it would not apply in depressed real estate markets. Significantly, the decision removes uncertainty from the Comprehensive Permit process that would have made a developer's decision to invest more difficult. Allowing a town to count unspecified market-rate housing towards its 10% goal would discourage a developer from using Chapter 40B if it could not tell at the outset whether a town might object to its application on the grounds that market-rate housing made Chapter 40B inapplicable. Finally, this decision confirms that the legislature did not intend to allow a lowest common denominator approach to providing housing to persons of low and moderate income, and therefore a town cannot rely on its cheapest and least habitable market-rate student apartments and dilapidated houses to

meet a statutorily-recognized housing need.

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