Housing Advisory: Decision Clarifies that Chapter 40B Projects Can Be Built on the Underutilized Portion of a Previously Developed Site

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In the past several years, state housing agencies and regional and municipal planners have been encouraging "smarter growth" in Massachusetts, including the construction of new housing in developed areas close to existing infrastructure and services. There is a growing consensus among developers and municipal officials alike that new housing in these locations can and should be constructed more densely than in outlying areas to preserve open space, to minimize the need for new infrastructure, and to reduce total vehicle trips by ensuring that people are close to neighborhood retail and centers of employment.

Where zoning ordinances have not yet been updated to allow for denser development, Chapter 40B has proven to be a useful tool in the smart growth toolbox, because it allows construction of higher–density projects than allowed by zoning. Chapter 40B also promotes infill development by providing, for example, a mechanism for the approval of projects on smaller lots, or encroaching closer to the lot line, or providing fewer parking spaces, than otherwise would be allowed.

But infill sites often are subject to earlier zoning approvals, which sometimes limit any further development. Over the years, the Housing Appeals Committee (HAC) has approved at least two developments despite limits on further development imposed by earlier town permits—including, at the request of Mintz Levin, a mixed-income apartment building on an underutilized corner of the parking lot of a commercial property in Natick. But those decisions did not address the prior municipal permits at any length, and some towns have continued to insist that a 40B development could not be built on a site that already has been developed, and is subject to its own development approval—particularly if the land proposed to be included in the 40B project was integral to the earlier approval, or if the carve–out would cause some zoning non-compliance on the remaining land. In *Taylor Cove Development, LLC v. Andover Zoning Board of Appeals* (July 7, 2009), a Housing Appeals Committee hearing officer, HAC Chairman Werner Lohe, put such arguments to rest, ruling that a Chapter 40B project can include land that was part of a previously approved development.

The *Taylor Cove* Decision

The developer in *Taylor Cove* submitted an application to the Andover Zoning Board of Appeals (ZBA) to build 32 condominium units. About half of the units were proposed to be built on a buildable lot (designated "Parcel A") that was part of a separate market–rate cluster subdivision

approved years earlier. The Andover ZBA denied the comprehensive permit on the grounds that Parcel A could not lawfully be included in the proposed development. The Andover ZBA reasoned that "Parcel A would effectively be subtracted from the cluster subdivision," making it too small to have qualified as a cluster subdivision, and thus "double–counting" Parcel A's area—first as an essential component of satisfying the minimum size requirement for the cluster subdivision, and later as an essential part of the proposed 40B project. The Andover ZBA further argued that the use of Parcel A would require modification of the earlier approval, an action it decided it could not take under Chapter 40B. Finally, the Andover ZBA argued that granting a comprehensive permit in these circumstances would run afoul of the concept of "infectious invalidity," a common law concept that occurs when a new lot is carved out of an existing developed parcel of land, and leaves the remainder parcel out of compliance with minimum lot size or other zoning requirements. In such a case, the newly severed lot, even if it complies with zoning, may be deemed to be "infected" by the off-site zoning violation on the remainder land.

On appeal, HAC Chairman Lohe held that Parcel A could properly be included as part of the proposed development. He started his analysis by noting that the concept of "infectious invalidity"
is "the foundation upon which all of the Board's arguments [rest]." He then examined the case law on infectious invalidity (noting in passing that the "concept… has not been defined comprehensively by the courts"), and determined that the use of Parcel A as proposed did not cause a zoning "infection"—and, as importantly, suggested that Chapter 40B grants local boards the power to cure such an infection, if one does exist.

The HAC Chairman offered four reasons for his holding. First, he determined that a zoning infection can arise only when a lot is divided to create a buildable lot and leaves behind a non–conforming lot. In this case, Parcel A was already a buildable lot; it was not divided from a lot that was rendered non–conforming. Second, he noted that the cases on infectious invalidity dealt with the creation of non–conforming lots as a result of an "as–of–right" process, with no public review, certainly not the case if the ZBA holds a comprehensive permit hearing. Third, the subdivision approval did not require Parcel A to be left as undeveloped open space; it was already buildable for a single–family home. Fourth and finally, the HAC Chairman pointed out that Chapter 40B is a remedial statute that is to be construed broadly to realize its purposes. Most notably, the HAC Chairman stated that "all of the legal impediments argued by the Board—whether in the zoning bylaw, cluster development bylaw, subdivision regulations, or elsewhere—are local requirements and restrictions that may be waived to facilitate the construction of affordable housing."

Chairman Lohe also considered whether the use of Parcel A for affordable housing required some modification to the original subdivision approval. He determined that since it is within the power of the planning board to modify a previously approved subdivision, so too is it within the power of the Andover ZBA, or HAC itself, acting under Chapter 40B. But Chairman Lohe saw no need to formally modify the earlier subdivision approval, reasoning that the need for such a modification is superseded by the comprehensive permit review process, during which the local board, or HAC itself, examines the relationship between the earlier existing development and the proposed affordable housing project to determine that the use of the parcel for housing does not create a safety problem or other local concern that could justify denial of the permit.

Lessons for Developers

Taylor Cove is a significant ruling for developers who are proposing a project on a site that consists in whole or in part of land that was part of an earlier development:

- *40B projects can be built on the underutilized portion of a site that is subject to prior development approvals*. HAC Chairman Lohe held clearly that the comprehensive permit review process supersedes the need to modify the original development approval.
- *40B can cure an alleged zoning "infection."* In dicta, the HAC Chairman strongly suggested that Chapter 40B permits a local board or HAC to waive any "infection" on the project site caused by a zoning non–compliance on an adjacent site. The developer is entitled to such a waiver, as long as the violation of the local requirement does not cause some safety issue or other local concern that outweighs the regional need for affordable housing.
- *Developers should address the merits of the proposal at the local hearing, or on appeal to HAC.* In this case, the local hearing focused on the legal issue, and thus the Andover ZBA did not consider whether the project presented any health, safety, or other local concern that would justify denial of the comprehensive permit. Therefore, HAC remanded the case to the Andover ZBA for further consideration of the merits of the comprehensive permit application. To avoid such a remand, developers should present evidence to the local board that the proposal in general, and the use of the land subject to a previous land–use approval in particular, poses no health or safety problems.
- *Developers should resist pressure to litigate "infectious invalidity."* A local board that has based a denial on an alleged zoning "infection" will want HAC to hear and consider evidence of the zoning infection. But the proper inquiry is whether the project as a whole raises any valid local concern. Accordingly, developers should avoid litigating the circumstances leading to the alleged infection, and instead should ask the ZBA and HAC to assume the infection exists, and simply to waive the local requirement if it presents no compelling local concern.

In at least one other appeal recently tried before HAC and awaiting decision, a developer, represented by Mintz Levin, seeks to overturn a permit denial that was based in part on alleged "infectious invalidity." Accordingly, we expect further guidance from the full HAC on this issue in the near future. If you have questions about the subject matter of this advisory in the meantime, please contact Jonathan Cosco or Paul Wilson, or one of the members of our Housing Practice Group listed to the left of this Advisory.

For assistance in this area,
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