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Housing Advisory: DHCD Denies Town Planned Production "Safe Harbor" Under New 40B Regulations

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In a ruling significant because it applies a brand new regulatory procedure, the Massachusetts Department of Housing and Community Development (DHCD) has ruled that the Town of Wareham is not entitled to deny or condition a developer's comprehensive permit under the Planned Production "safe harbor." The decision is only the second made by DHCD under new regulations implementing Chapter 40B, the state's affordable housing law. Paul Wilson and Jon Cosco of Mintz Levin's Housing Practice Group represented this developer in the proceedings.

Chapter 40B encourages the creation of new affordable housing by allowing the developer to seek a single "comprehensive permit" from the Zoning Board of Appeals (ZBA) in lieu of all other local approvals. Since its inception, Chapter 40B has been a lightning rod for criticism by some municipal officials who feel that the statute strips them of the authority to make local land use decisions. In 2003, DHCD responded to this criticism by issuing regulations which created certain municipal "safe harbors" which, once achieved, allow a local ZBA to deny a comprehensive permit or condition a permit however it chooses; such denial or conditions will be presumed to be "consistent with local needs," foreclosing any developer appeal to the Housing Appeals Committee (HAC). In effect, once a safe harbor status is achieved, the qualifying city or town can pick and choose which 40B projects it wants to approve (if any at all).

One of the most important of these safe harbors—sometimes called the "planned production" safe harbor—can be achieved in a two-step process. First, the municipality must develop an affordable housing production plan and have that plan approved by DHCD. Second, the municipality must produce new affordable units consistent with that plan and have DHCD certify its compliance with the housing plan. From 2003 until February 2008, a city or town could achieve the planned production safe harbor by approving new affordable units equal to 0.75% of all housing units in that city or town. In other words, if DHCD certified that a city or town (whose housing production plan it had approved) had issued permits for new affordable units exceeding 0.75% of the city or town's total housing stock, then the ZBA in that city or town would enjoy a 12-month window during which it could deny any subsequent 40B applications.

In February 2008, DHCD overhauled Chapter 40B's implementing regulations. In so doing, it expanded the planned production safe harbor, so that cities and towns now qualify for "safe harbor" status if they create new affordable housing units equal to only 0.5% of the municipal housing. The updated regulations also made a procedural change as to municipal claims of any safe harbor, including for planned production. The regulations now require that any disagreement between the town and a developer about whether the town has achieved safe harbor status—whether by reaching a statutory minimum such as creating affordable units equal to 10% of the town's housing stock, or a regulatory minimum such as affordable units totaling 0.5% pursuant to an approved housing production plan—must be resolved at the outset of the ZBA's public hearing. Any ZBA claiming safe harbor protections must now assert such status in writing within 15 days of the opening of the public hearing. The applicant can respond if it disagrees, and DHCD will make a preliminary ruling on the asserted safe harbor within 30 days of receiving the developer's reply.

In this case, the Town of Wareham ZBA claimed that it had achieved the planned production safe harbor because it had issued a comprehensive permit for a different, 49-unit project in calendar year 2007, approximately ten months before our client filed its application. However, Wareham never asked DHCD to certify that it was in compliance with its housing production plan—that is, not until our client's project came in the door. Only then did the Wareham ZBA ask for certification, claiming not only that it was entitled to certification for hitting the new 0.5% threshold, but also suggesting that its 12-month window of protection should start to run from some unspecified date later than the date it issued the earlier permit.

DHCD did not agree. DHCD held that Wareham had not achieved certification of its housing production plan by DHCD before our client applied for its permit, a prerequisite for claiming the planned production safe harbor, and, indeed, had delayed its request for certification well into the calendar year after it approved the 49 units, which was too late to seek certification anyway. In addition, DHCD noted that Wareham had not approved enough new units to be eligible for the 0.75% safe harbor in effect when it approved the first project.

The new regulations provide a ZBA with the right to take an interlocutory appeal of DHCD's determination to the Housing Appeals Committee, which will hear such appeals on an expedited basis. The Wareham ZBA exercised that right in this case. Unless the developer and the ZBA reach an accommodation rendering their disagreement moot, the housing community will soon see the first HAC decision under these new procedures, too.

For assistance in this area, please contact Paul Wilson or Jonathan Cosco, or one of the other attorneys in Mintz Levin's Housing Practice Group.

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