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Housing Alert: SJC Holds That Easement over Municipal Land Is Not Authorized under Chapter 40B

4/10/2008

In the March 31, 2008 decision of the Massachusetts Supreme Judicial Court (SJC) entitled *Zoning Board of Appeals of Groton v. Housing Appeals Committee*, 451 Mass. 35 (2008), the state's highest court held that Massachusetts' affordable housing statute, Chapter 40B, does not authorize the state Housing Appeals Committee (HAC), or local zoning boards of appeals, to order a city or town to convey an easement of municipally owned land to a subsidized housing developer. The *Groton* case was the first case to be decided among a group of seven Chapter 40B cases upon which the SJC heard oral arguments in early February 2008. *See* "Supreme Judicial Court to Hear Seven Housing Cases in February" (Mintz Levin Housing Advisory, Jan. 30, 2008).

In *Groton*, a subsidized housing developer proposed to the Groton Zoning Board of Appeals (the "Groton ZBA") the construction of a 44-unit condominium project by Chapter 40B comprehensive permit. The Groton ZBA denied the developer's application on grounds that included the Groton ZBA's concern that, as proposed, the project would result in an unsafe stopping sight distance for vehicles traveling on the curving road fronting the project site when those vehicles encountered others exiting or entering the development's access road. On the developer's appeal to the HAC of the Groton ZBA's denial, the HAC agreed with the Groton ZBA's position with respect to an unsafe stopping sight distance on the main travel road. However, the HAC had a solution: the danger could be eliminated by clearing vegetation and regrading a swath of abutting town-owned land totaling approximately 900 square feet that is used by the Groton Electric Light Department. Such work would require an easement, which the town was unwilling to grant.

Because this clearing and regrading work was the primary obstacle to building a subsidized housing development free of traffic safety problems—and because the intent of Chapter 40B is to remove local obstacles to the construction of subsidized housing—the HAC reasoned that the town should grant the easement to allow the clearing and regrading. Acknowledging that granting an easement over town land requires a vote of Town Meeting, the HAC nonetheless found that such a requirement was, like municipal zoning bylaws, merely another local "requirement or regulation" that zoning boards of appeals or the HAC can set aside under Chapter 40B. The HAC thus overturned the Groton ZBA's denial of the developer's application, and issued its own permit that included a condition requiring the town to grant an easement for the clearing and regrading work to remedy the insufficient stopping sight distance.

Groton appealed the HAC decision to Superior Court. The Superior Court judge affirmed the HAC decision in all material respects, including the HAC's order to the town to grant the developer the easement. The "giving up of a property right in the [t]own's realty is not a matter to be taken lightly," the Superior Court judge wrote, but the easement involved only "a minimal giving up of a property right," and so the HAC was correct to order the easement when, without one, subsidized housing favored by Chapter 40B would not be built.

The SJC disagreed and held that the HAC and the Superior Court were wrong for two reasons:

First, an easement—irrespective of how "minimal" an intrusion it might involve—does not fall within the ambit of "permits or approvals" that Chapter 40B authorizes local boards of appeals, or the HAC acting in their stead, to grant. In the context of the statute, the *Groton* court said, these "permits or approvals" pertain only to:

> building permits or other approvals typically given on application to, and evaluation by, separate local agencies, boards, or commissions whose approval would otherwise be required for a housing development to go forward.

This interpretation is underscored, the SJC held, by language in Section 21 of Chapter 40B stating that the role of zoning boards of appeals (and, by extension, the HAC) is to step into the shoes of those town boards and officials "who would otherwise act with respect to [conventional zoning] application[s]." Easements are normally obtained from abutters separately from the local permitting process, the court pointed out, and town boards and officials are powerless to grant them to an applicant as part of the permitting process. The "requirements and regulations" that the HAC believed encompassed municipally controlled access to abutting land in fact pertain only to "limitations on *an owner's use of his property*" (emphasis in original). Easements, by contrast, pertain "to the use of someone else's property," and thus are not authorized by Chapter 40B.

Second, said the *Groton* court, a Massachusetts statute says that a conveyance of an easement over town-owned land must win the approval of a Town Meeting vote. Under Chapter 40B, zoning boards of appeals and the HAC may only override "locally imposed barriers to affordable housing, not State law." Therefore, the HAC erred in dispensing with the requirement for a Town Meeting when it ordered the granting of the easement.

Groton marks the first case since Chapter 40B's enactment in 1969 in which the SJC has pared back the scope of the HAC's exercise of authority. Following this decision, the HAC (and, in the first instance, zoning boards of appeals) will remain empowered to exempt developers from local bylaws, ordinances, rules, or other municipal requirements that would impede the construction of affordable housing. It will just have to do so in a manner that does not purport to affect a municipality's property rights in abutting land.

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If you would like to discuss any of these cases, or for further information about any of them, please contact any member of Mintz Levin's Housing Practice Group listed below.

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