Housing Alert: Massachusetts' Highest Court Instructs Town Boards of Appeals Not to Invade the Province of State Subsidizing Agencies

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After several years of debate, disagreement, and litigation between developers of subsidized housing and local zoning boards of appeals (ZBAs) concerning the question of the breadth of those boards' authority over comprehensive permit applications under G.L. c. 40B ("Chapter 40B"), the Supreme Judicial Court has settled an important aspect of the question. On September 3, 2010, in *Zoning Board of Appeals of Amesbury v. Housing Appeals Committee*, ("*Amesbury*"), the Court held that "programmatic" aspects of a comprehensive permit project belong solely within the purview of state-level subsidizing agencies (such as, in *Amesbury*, MassHousing). Therefore, the Court said, local boards of appeals must not tread upon these areas when conducting their review or attaching permit conditions. Chapter 40B confines the board of appeals' review, and the permit conditions it can impose, to health, safety, or planning concerns. In reaching this decision, the Court upheld the position of the Housing Appeals Committee (HAC), the Department of Housing and Community Development, and MassHousing and other state subsidizing agencies.

With increasing frequency over the last several years, some boards of appeals like Amesbury's had taken to attaching conditions to comprehensive permits that had 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, how the housing could be marketed, or 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.

After the Amesbury ZBA attached such "programmatic" conditions to its comprehensive permit, the subsidizing agency, MassHousing, said it could not fund the development, fearing that if towns could impose such 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 a town unfriendly to subsidized housing could impose programmatic conditions that might discourage the construction of mixed-income housing in that town—for example, stringent profit limitations that make it economically infeasible for developers to move ahead with their projects.

Despite MassHousing's refusal to fund the project if the objectionable conditions remained in place, the Amesbury ZBA would not remove or modify the conditions, which led the developer to appeal those conditions (among others) to the HAC, which struck or modified those conditions that sought to usurp the programmatic role of MassHousing. The ZBA then appealed.

Thankfully for proponents of subsidized housing, the Supreme Judicial Court recognized that to adopt Amesbury's position that towns should be free to impose their own set of programmatic conditions on 40B projects would be "devastating … [to] the creation of new affordable housing," the indisputable purpose of the statute. "[T]he local zoning board's power to impose conditions is not all encompassing," the Court held, "but is limited to the types of conditions that the various local boards in whose stead the local zoning board acts might impose, such as those concerning matters of building construction and design, siting, zoning, health, safety, environment, and the like." And the HAC was therefore correct, the Court continued, in striking from the Amesbury ZBA's comprehensive permit those conditions that strayed outside these conventional areas of local zoning and into the province of state subsidizing agencies.

The Court also rejected the Amesbury ZBA's argument that the text of Chapter 40B prohibited the HAC and the courts from striking or modifying the programmatic conditions because the developer had not first proven that those conditions rendered the overall project "uneconomic." Because such conditions are outside a board of appeals' authority to impose to begin with, the Court reasoned, the HAC is free to remove them without going through the exercise of evaluating their economic impact on the project. The Court went on to clarify that the holding in its 2008 decision *Board of Appeals of Woburn v. Housing Appeals Committee* remained intact insofar as the HAC still may not strike a board of appeals' health, safety, or planning conditions from a comprehensive permit unless there has first been a showing that these conditions render the project uneconomic.

So while town boards of appeals are likely to continue to impose numerous conditions on comprehensive permits which, in the eyes of the affected developer, may be designed to thwart the project by making it unprofitable or too difficult to build, the Supreme Judicial Court's *Amesbury* decision will at least put a stop to the types of conditions regulating occupancy eligibility guidelines, profit limitations, and other programmatic matters that had made projects unfundable by the state subsidizing agencies. Assuming Chapter 40B survives the latest repeal effort by subsidized housing opponents, the Question 2 referendum on the November ballot, this Supreme Judicial Court decision will be a very welcome development for future 40B applicants.

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