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REAL ESTATE AND LAND USE ALERT:

Affordable Housing, Chapter 40B and Comprehensive Permits

Summary of Recent Decisions of Massachusetts Supreme Judicial Court

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Despite the recent housing slowdown, the Massachusetts Supreme Judicial Court has been active on affordable housing under the “comprehensive permit” law, Chapter 40B. The SJC has issued eight decisions on Chapter 40B within the last year, including two last month. Those SJC decisions, coupled with the new comprehensive permit regulations issued by the Department of Housing and Community Development in February 2008 (760 CMR 56.00), will affect the planning, permitting and appeals of affordable housing projects.

To follow is a brief summary of four of the SJC’s cases. If you have any questions on them or a separate project, please contact me.

1. **In Ipswich (Jepson v. ZBA)**, the ZBA had issued a permit allowing 8,220 square feet of commercial space along with 48 rental residential units. Commercial use was allowed in the underlying zoning district, but dimensional variances would have been required for the building. On appeal, the SJC allowed the mixed-use project, ruling that “incidental” commercial use could be included in a comprehensive permit for residential housing. (This is a helpful ruling for mixed-use projects as long as commercial use is permitted on the property and is “incidental”. However, the SJC noted that the proposed housing development can not be a “subterfuge” or “pretext” for commercial development.)

2. **In Lexington (Taylor vs. Housing Appeals Committee)**, the HAC had ordered the local Zoning Board of Appeals to increase the number of approved units from 28 to the 36 that the developer had requested. (The developer has already dropped from the original 48 units.) Neighbors appealing the project claimed that the HAC should not have considered the developer’s appeal because the Town had reached its 10% threshold of affordable housing by the time the HAC issued its decision.

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However, the SJC ruled that the date to calculate whether a town has met the 10% threshold is the date when a ZBA files its decision with the town clerk, not the date of the application or the date the HAC completes its appeal. The SJC noted that this approach provides “greater freedom” to a town to deny an application if it is approaching the 10% threshold, especially if it is facing multiple applications. The SJC also noted that a town’s ability to choose between applications, including denying a project that has proceeded through “extensive and costly hearings”, could place a “greater burden on developers.”

3. **In Groton (ZBA vs. HAC)**, the ZBA had denied a 44-unit project on the basis of traffic safety hazards. On appeal, the HAC agreed that there was inadequate stopping sight distance. However, the HAC determined that the hazards could be eliminated by regrading and clearing on adjacent land owned by the Town. Therefore, the HAC issued a permit requiring the Town to grant an easement to the developer to perform the regrading. On further appeal, the SJC reversed the HAC, ruling that the HAC lacked authority to require the Town to convey an easement on its land to the developer. (State law requires a vote of town meeting to convey an easement, and a comprehensive permit does not supersede state law.)

4. **In Canton (ZBA vs. HAC)**, the ZBA had denied a permit for 225 units “primarily [due to] increased vehicular traffic.” On appeal, the HAC reversed the ZBA and ordered it to issue a comprehensive permit, finding that traffic concerns were primarily a matter of “inconvenience” that did not rise to a public safety concern that outweighed the need for affordable housing. On further appeal, the SJC addressed procedural issues in the case, not the merits, and the SJC remanded the case to the lower court for additional review. (This means that, after six years from the original application in June 2002, the permit is still not final due to all the appeals.)

There are other recent cases in Hingham, Wrentham, Amherst and Middleboro. Please let me know if you would like information on them or the new comprehensive permit regulations.

This communication is intended to provide general information about an area of law. It is not legal advice. You should consult with legal counsel for advice specific to your circumstances.

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