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**REAL ESTATE AND LAND USE ALERT:**

**Affordable Housing, Chapter 40B and Comprehensive Permits**

**Summary of Decision Involving City of Woburn, Issued by the  
Massachusetts Supreme Judicial Court**

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I recently circulated a summary of court decisions issued by the Massachusetts Supreme Judicial Court on affordable housing under the “comprehensive permit” law, Chapter 40B. Since that time, the SJC has issued *another* important decision, this one involving the **City of Woburn**. The SJC ruled that the City of Woburn was authorized to drastically cut the size of a project (from 640 units to 300 units) if the developer was not able to prove that the cut made the project “uneconomic”. The SJC indicated that the Commonwealth should revise its housing regulations to control such drastic cuts in a project.

The SJC remains active on affordable housing, with nine decisions on Chapter 40B within the last year. Those decisions, coupled with new comprehensive permit regulations issued by the Department of Housing and Community Development in February 2008 (760 CMR 56.00), are important for affordable housing projects.

In the **Woburn** case (**Board of Appeals vs. Housing Appeals Committee**), the developer had applied for 640 units of housing on 75 acres. The local Zoning Board of Appeals “approved” a comprehensive permit for the project with conditions, including one limiting the development to 300 units, amounting to a cut of approximately 55%.

On appeal, the Housing Appeals Committee agreed that 640 units were too many. However, the HAC determined that a cut to 300 units was not consistent with local housing needs under the statute. The HAC therefore rejected the ZBA’s limit of 300

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units and ordered the ZBA to issue a comprehensive permit with 240 additional units, for a 540-unit development.

On further appeal, the SJC upheld the ZBA's original permit reducing the number of units from 640 to 300. The SJC determined that, where the ZBA had *approved* the comprehensive permit *with conditions*, the developer had the burden of proving on appeal that the conditions made the project "uneconomic". Because the developer was not able to prove that the reduced project was uneconomic, the HAC lacked authority to reverse or modify the conditions on appeal.

(If the developer had been able to demonstrate that the conditions made the project uneconomic, the burden of proof would then have shifted to the ZBA to demonstrate that there were valid local concerns that supported the conditions and that those concerns outweighed the regional need for housing. Similarly, if the ZBA had denied the permit outright, the ZBA would have had the burden of proving that the denial was valid. Due to this burden-shifting approach, it is not uncommon for local boards to issue a comprehensive permit with *very difficult* conditions, including significant cuts in density, as opposed to denying a permit outright, to improve their chances on appeal.)

In her concurring opinion, Chief Justice Marshall indicated that DHCD should promulgate regulations to define and clarify "uneconomic" and "reasonable return", to assist the HAC in determining when a ZBA's reduction in units renders a project uneconomic. The Chief Justice noted that, without such regulations, "a local board remains free to impede the pace at which affordable housing units -- so urgently needed -- are constructed in the Commonwealth, even if a larger project would be entirely consistent with local needs."

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