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# Unprecedented Chapter 40B activity at SJC results in several significant decisions

By Theodore C. Regnante and Paul J. Haverty

The Supreme Judicial Court over a period of two days in February heard oral arguments on seven separate cases involving appeals of comprehensive permit decisions made pursuant to G.L.c. 40B, §20-23. This unprecedented activity has resulted in a number of significant decisions which provide much-needed clarity to a statutory scheme which can too often be opaque even to the most seasoned practitioner. Unfortunately, the procedural posture of some cases prevented the SJC from addressing the substantive merits, while the language of the statute itself limited the ability of the SJC to provide the clarity to the process desired by practitioners.

The first decision issued by the SJC was on an appeal of a Housing Appeals Committee decision ordering the grant of a sight-line easement over a parcel of land owned by the Groton Electrical Light Department. (*Zoning Bd. of Appeals of Gorton v. Housing Appeals Comm.*, 451 Mass. 35 (2008)) The HAC had ordered the grant of the easement in reliance on a previous SJC decision (*Board of Appeals of Maynard v. Housing Appeals Comm.*, 370 Mass. 64 (1976)) which suggested that the requirement for town meeting approval could, in appropriate circumstances, be disposed of as part of a Chapter 40B approval process. *Id.* at 39. The Superior Court, hearing the matter pursuant to a Chapter 30A appeal brought by the board, agreed with the HAC, noting that the minimal right being surrendered by the town (the easement only required that vegetation on the town-owned property be maintained to provide a sight-line to allow adequate sight distance for the project access road) was outweighed by the regional need for affordable housing.

The SJC disagreed, holding that Chapter 40B does not allow the HAC “to order a municipality to convey an easement,” and that the requirement for town meeting approval is a state law which may not be waived as part of a Chapter 40B process. *Id.* at 39-41.

The SJC distinguished this case from the Maynard case, noting that the Maynard case involved the extension of the municipal sewer system, and did not “involve or authorize the transfer of an interest in municipal land in the form of a mandated easement.” *Id.* at 41. The SJC’s holding is thus limited to the proposition that the HAC may not require a municipality to convey an interest in land, no matter how minor an interest. The holding does not limit the ability of the HAC to order municipalities to grant any and all local permits typically required as part of the land development process in the municipality.

The next decisions from the SJC were two cases featuring conflicting Superior Court decisions regarding the proper time for determining whether a municipality has met its 10 percent affordable housing minimum pursuant to Chapter 40B. In *Zoning Bd. of Appeals of Canton v. Housing Appeals Committee*, 451 Mass. 158 (2008), the Superior Court had held that the HAC lost jurisdiction to hear an appeal brought by a developer pursuant to G.L.c. 40B, §22 when the town of Canton exceeded its 10 percent affordable housing minimum while the developer’s appeal was pending at the HAC.

In reaching its determination, the Superior Court found invalid a Department of Housing and Community Development regulation setting the time for determining consistency with local needs

(which includes the 10 percent requirement) at the time the decision of the board of appeals is filed with the municipal clerk. *Id.* at 159. However, another Superior Court, faced with the same question of whether the HAC loses jurisdiction to hear an appeal once a town has exceeded its 10 percent requirement, expressly declined to follow the reasoning of the Canton Superior Court, and upheld the validity of the DHCD regulation. (*Taylor v. Housing Appeals Comm.*, 451 Mass. 149 (2008).)

Faced with these two diametrically opposed decisions, the SJC granted direct appellate review of both cases. Ultimately, the SJC issued decisions which upheld the decision of the Taylor court and overturned the decision of the Canton court.

The SJC's decision in the Canton case did not contain an in-depth discussion of the issues, instead relying upon a citation to the Taylor case issued on the same day. In the Taylor decision, the SJC stated that the DHCD's regulation setting the time for determining consistency with local needs at the time the comprehensive permit decision is filed with the municipal clerk "is consistent with the language of the act and is rationally related to its purposes."

Thus the SJC upheld the Superior Court decision in the Taylor case, and overturned the Superior Court decision in the Canton case. In upholding the DHCD regulation, the SJC noted that a prior version of the regulation had set the applicable date at the time the comprehensive permit application was filed with the local board of appeals.

The SJC, in a footnote, indicated that it may prefer the original regulation, noting that this change places a burden on developers, and stating that "[h]ad the calculation date remained the pre-1991 date of application, a developer would know at the outset whether the decision of the zoning board of appeals would be appealable." *Id.* at 156 [FN 8]. This language in the SJC's decision is significant, as subsequent to the hearing at the SJC on the Taylor and Canton cases, but prior to the issuance of the decisions on these cases, the DHCD promulgated new regulations, including a regulation changing the date for determining consistency with local needs to the date of the filing of the comprehensive permit application. 760 CMR 56.05(3). The language of the Taylor case indicates strongly that the revised DHCD regulation setting the time for determining consistency with local needs will be upheld if challenged.

The development in the Taylor case was the subject of another recent SJC decision, this one on an appeal brought by abutters to the project, *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008). Because the HAC had already ruled on the appeal brought by the developer pursuant to G.L.c. 40B, §22, which overturned the decision of the Lexington Board of Appeals, the developer brought a motion to dismiss the complaint brought by the abutters, on the grounds that the ruling by the HAC rendered moot the appeal of the original decision.

The Superior Court agreed, and granted the motion to dismiss. However, the abutters appealed, and the Appeals Court reversed. (*Taylor v. Board of Appeals of Lexington*, 68 Mass. App. Ct. 503 (2007)) The developer appealed to the SJC, and the SJC reversed the decision of the Appeals Court and affirmed the Superior Court's decision. (*Taylor v. Board of Appeals of Lexington*, 451 Mass. 270 (2008).)

However, the SJC, reviewing the claim that the interests of abutters can be adequately represented by allowing intervention at the HAC, noted that the HAC is limited to either affirming the decision of the board or granting the relief sought by the applicant. The SJC expressed concern that the rights of abutters may not be adequately represented in situations where an appeal brought pursuant to G.L.c. 40B, §21 and G.L.c. 40A, §17 is rendered moot by a decision made pursuant to G.L.c. 40B,

§22. Accordingly, the SJC determined that abutters may bring an appeal pursuant to G.L.c. 40A, §17 of the “operative” comprehensive permit resulting from the HAC decision, which would either be granted by the local board of appeals on remand, or if the board fails to act within 30 days, the decision of the HAC becomes the comprehensive permit pursuant to the terms of G.L.c. 40B, §23.

This decision thus creates a right to appeal HAC decisions pursuant to G.L.c. 40A, §17, despite the plain language of G.L.c. 40B, §22. The SJC’s decision appears to limit the issues which may be addressed in this additional appeal, however, as the SJC stated “[t]o the extent that the issues raised in the developer’s administrative appeal, those issues were addressed de novo by the HAC, and, pursuant to G.L.c. 30A, by the judge. The abutters have had their opportunity to be heard on those issues.” Thus it appears that only issues not addressed as part of the HAC decision (and any subsequent review pursuant to G.L.c. 30A) may properly be the subject of a subsequent appeal brought pursuant to G.L.c. 40A, §17.

It is significant to note that prior to the issuance of the SJC’s decision in *Taylor v. Board of Appeals of Lexington*, the DHCD promulgated new regulations regarding intervention into HAC cases. The new regulations explicitly allow intervention by any person “who would have standing as a person aggrieved to appeal the grant of a special permit in accordance with M.G.L.c. 40A, §17.” 760 CMR 56.06(2)(b). Thus any person having standing to appeal pursuant to G.L.c. 40B, §21 and G.L.c. 40A, §17 will also have standing to intervene in the HAC appeal. This new regulation is significant, because the SJC decision states that an appeal brought pursuant to G.L.c. 40B, §21 will be automatically stayed when appeal is also filed pursuant to G.L.c. 40B, §22. Thus abutters appealing to the trial court will be provided notice that the HAC appeal is pending, and that the abutter should move to intervene to protect its substantive rights. It can be argued that the failure of an abutter to move to intervene in the HAC hearing constitutes a waiver of any issue which could have been finally determined by the HAC if it had intervened. As the SJC noted in its decision, one of the purposes of Chapter 40B is to streamline the permitting process; therefore, abutters should not be allowed to artificially extend the process by declining to participate in the HAC hearing, despite having the right to intervene, and having notice of the appeal.

The SJC issued decisions recently on two additional Chapter 40B cases, both of which featured significant substantive issues which were not addressed by the SJC because the cases were not properly before it procedurally.

In the first case, *Town of Hingham v. Department of Housing and Community Development*, 451 Mass. 501 (2008), the town of Hingham filed a declaratory judgment action against the Department of Housing and Community Development, seeking to challenge the number of affordable housing units listed on the Subsidized Housing Inventory kept by the DHCD. The town had previously approved a continuing care retirement community which contained among other units, 1,750 rental apartment units. However, all residents of the community were required to pay an entrance deposit, ranging from \$195,000 to \$435,000, in addition to monthly rental fees.

The DHCD determined that this arrangement was not consistent with typical rental developments, and informed the town that only 25 percent of the units would be countable on the town’s SHI. The SJC upheld a decision of the Superior Court dismissing the town’s complaint, noting that the town had failed to show an actual controversy and had failed to exhaust its administrative remedies. The SJC cited 760 CMR 31.04(1)(a) in stating that “the SHI merely carries a presumption of correctness and that a party, including a town, may introduce evidence to rebut the presumption at the later proceeding.”

The SJC thus held that the proper action for the town would have been to hold a formal hearing on

any comprehensive permit application, and if the town believed it was over its 10 percent housing obligation, deny that permit and wait for the developer to appeal to the HAC, at which point would have been the proper time to challenge the SHI. Since the SJC did not address the important substantive issues involved, it is likely that this case will resurface at the appellate level once the administrative review process has been properly completed.

In *Town of Wrentham v. West Wrentham Village, LLC*, 451 Mass. 511 (2008), the SJC was again presented with a premature appeal of an issue regarding the counting of units on the SHI. In this case, the town appealed a decision of the HAC which determined that 300 units located in a development center managed by the Department of Mental Retardation were not properly counted in the town's SHI, as the town claimed they should be.

The HAC overturned a decision of the Wrentham Board of Appeals denying the project and remanded the matter to the board for a full hearing (because the Board, believing it had met its 10 percent affordable housing requirement, had denied the project without holding a hearing on the merits). The Town of Wrentham, acting through the board of appeals, appealed to the Superior Court pursuant to both Chapter 30A and also seeking a declaratory judgment.

For the reasons discussed in the Hingham case, the SJC rejected the declaratory judgment claim. The SJC also upheld the Superior Court's dismissal (also upheld by the Appeals Court, *Town of Wrentham v. Housing Appeals Comm.*, 69 Mass. App. Ct. 449 (2007)) of the Chapter 30A complaint, stating that the ruling of the HAC was not a final decision of the agency, as the matter was remanded to the board for a full hearing. In addition to citing traditional exhaustion of remedies case law, the SJC noted that allowing such interlocutory appeals of HAC decisions would frustrate the intent of Chapter 40B to streamline the permitting process for affordable housing developments. While the decision of the HAC in both the Hingham and Wrentham cases were clearly the proper decisions, it is unfortunate that the substantive issues in these cases could not have been resolved, as they involve important questions regarding how the SHI is compiled.

The final case decided by the SJC was *Board of Appeals of Woburn v. Housing Appeals Comm.*, 451 Mass. 581 (2008), which examined the authority of the HAC to treat a decision issued by a local board of appeals with conditions which significantly reduced the number of units in a proposed development as a "constructive denial" rather than as an approval with conditions.

The HAC, in reviewing a comprehensive permit decision issued by the Woburn Zoning Board of Appeals granting a comprehensive permit with numerous conditions, including one condition which reduced the number of units in the project from the requested 640 units to 300, determined that the conditions imposed by the board did not render the project uneconomic. However, the HAC did not end its analysis there, noting that the reduction in units was not linked to any legitimate issues of local concern. The HAC then issued a decision approving 420 units, a decision which both parties appealed to the Superior Court.

The Superior Court upheld the HAC's determination that the conditions imposed would not render the project uneconomic, but remanded the matter to the HAC to determine whether the conditions imposed by the board, given the drastic reduction in the number of units, acted as a functional equivalent of a denial of the project. On remand, the developer submitted evidence showing that a 540-unit project could be constructed without impacting local needs, and the HAC agreed finding that the decision constituted a constructive denial, and issuing a decision approving 540 units. After the Superior Court upheld the HAC's decision, the SJC granted direct appellate review.

The SJC disagreed with the HAC and the Superior Court, citing G.L.c. 40B, §22, to note that “[d]emonstrating that the conditions render a project uneconomic is, therefore, a necessary element of the developer’s prima facie case for relief.” The SJC went on to state that “[a]bsent such a showing, the board is not required under the act or the department’s regulations to demonstrate that its conditions are consistent with local needs.”

The Court further stated that once the HAC found the conditions imposed by the board did not render the project uneconomic, “its inquiry should have ended there.” The majority opinion raises real questions about whether or not a board of appeals may impose conditions upon a comprehensive permit that are unquestionably illegal, arbitrary and capricious, and such conditions may not be disturbed by the HAC.

It is unlikely that the SJC could have intended that a board may impose conditions that directly violate Chapter 40B or other applicable laws so long as such conditions do not render a project uneconomic. For instance, conditions which violate fair housing laws or which usurp the regulatory authority of the subsidizing agency will not likely be allowed to stand, even if such conditions are not found to render a project uneconomic. To take the issue to the absurd, a literal reading of the majority decision would allow a board to impose a condition requiring a developer to paint each board member’s house, and if such clearly illegal condition did not render the project uneconomic, the developer would be unable to appeal. It is unlikely that developers will be willing to continue to develop affordable housing pursuant to Chapter 40B if it becomes clear that they will not be allowed to appeal illegal, unreasonable, arbitrary and capricious conditions imposed by boards of appeal.

While the majority opinion in the Woburn case raises concerns, Chief Justice Margaret H. Marshall, in a concurring opinion, voiced many of these concerns, and noted that the concurrence was based upon the fact that the DHCD had not “promulgated regulations to address the issue presented in this case.” Marshall went on to state that in situations where a project is significantly reduced in size without justification, and where the project would be otherwise consistent with local needs, the “HAC should have the authority to consider whether the project is effectively uneconomic under appropriately promulgated regulations.”

In response to the suggestion raised by the chief justice, the DHCD has updated the definition of “Reasonable Rate of Return” in its Comprehensive Permit Guidelines to include language stating “[a] condition imposed by the board to decrease the number of units in a project by five percent or more shall create a rebuttable presumption that the developer will not be able to achieve a reasonable rate of return.”

Hopefully, this language will be sufficient to satisfy the SJC even though it is contained in guidelines rather than in regulations. The best result would be if the Legislature would address this problem as well as the other issues raised in the SJC cases through corrective legislation; however, it is unlikely that there is sufficient consensus in the Legislature at this time to pass such legislation.

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*Ted Regnante is a partner in the Wakefield firm of Regnante, Sterio & Osborne. He has represented numerous applicants for comprehensive permits throughout Massachusetts and served on former Gov. Mitt Romney’s Housing Appeals Advisory Committee (which resulted in recommendations adopted by the Department of Housing and*



*Community Development streamlining the procedures at the Housing Appeals Committee). Regnante is also a member of the REBA Board of Directors. He can be reached at [tregnante@regnante.com](mailto:tregnante@regnante.com).*



*Paul Haverty is an associate in the Wakefield firm of Regnante, Sterio & Osborne. He has represented numerous applicants for comprehensive permits throughout Massachusetts. Prior to joining Regnante, Sterio & Osborne, Haverty was a law clerk for Chief Justice Karyn F. Scheier of the Land Court. Haverty is a member of the REBA Affordable Housing Committee. He can be reached at [phaverty@regnante.com](mailto:phaverty@regnante.com).*

*Ted Regnante and Paul Haverty submitted an amicus brief to the SJC on both the Canton and Taylor cases on behalf of both REBA and the Citizen's Housing and Planning Association.*