

Housing Appeals Committee decision trumps parallel abutter appeal

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A recent Superior Court decision has introduced a new dynamic in appeals of comprehensive permit decisions pursuant to G. L. c. 40B, §§20-23.

Judge Christopher J. Muse in *Taylor v. Board of Appeals of Lexington* (Middlesex Superior Court No. 03-0746, Dec. 1, 2005) held that a decision of the Housing Appeals Committee (HAC) in an appeal relating to regional planning issues brought by a developer under G.L.c. 40B, §22, trumps appeals brought by abutters under G.L.c. 40A, §17.

This case has been appealed to the Appeals Court by the abutters. Given the important issues contained in the appeal, the Supreme Judicial Court may take direct appellate review.

Lexington Project

In January 2002, Rising Tide Development, LLC (Rising Tide), submitted to the Lexington Board of Appeals (the Board) an application for a comprehensive permit pursuant to G.L.c. 40B, §§20-23 for the construction of 48 condominium units on 3.6 acres of land in Lexington.

During the hearing process before the Board, Rising Tide voluntarily reduced the density of the project to 36 units. On Feb.

7, 2003, the Board unanimously granted the comprehensive permit to Rising Tide, but among other conditions, reduced the density of the project to 28 units.

Rising Tide appealed the Board's decision to the HAC pursuant to G.L.c. 40B, §22, claiming the density reduction rendered the project uneconomic. Additionally, an abutters group appealed the Board's decision to the Superior Court, pursuant to G.L.c. 40A, § 7, claiming the Board's decision even at the reduced density was improper. Chapter 40B creates a dual appellate procedure, allowing aggrieved developers to appeal to the HAC while aggrieved abutters can appeal to the Land Court or Superior Court.

The HAC Appeal

The main issue before the HAC in Rising Tide's appeal was whether the conditions imposed by the Board rendered the project uneconomic. *Rising Tide Development, LLC v. Lexington Bd. of Appeals*, No. 03-05 (Mass. Housing Appeals Comm., June 14, 2005). Because the HAC found that the reduction in density rendered the project uneconomic, it proceeded to the next step in the analysis, which was to determine whether the con-

ditions were consistent with local needs.

The HAC allowed an abutter group to participate in the hearing process, and in its decision allowed the group's Motion to Intervene, but only as related to the issue of density.

The HAC went on to find that the density for the project was appropriate and in character with the neighborhood. It also found that the proposed buildings would not be unduly intrusive due to their bulk and setback from adjoining yards. The HAC noted that the proposed buildings would comply with local zoning regulations for building height, and that the proposed setbacks would be greater than the setbacks of the existing structures on the site, which were proposed to be demolished.

For these reasons, among others, the HAC held that the proposed buildings would not have a significant impact upon the abutters. The Board has appealed the decision of the HAC to the Superior Court pursuant to G. L. c. 30A, § 14.

Superior Court case

The Superior Court case filed by the abutter group was stayed until the HAC decision was issued. Following the HAC

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decision, Rising Tide filed a motion for summary judgment seeking the dismissal of the abutter appeal because the HAC had already ruled on the regional planning issues contained in the abutter appeal.

The abutters argued that their separate appellate route pursuant to G.L.c. 40A, §17 is specifically provided for in G.L.c. 40B, §21, therefore the legislative intent was to allow this type of appeal to proceed – even if duplicating issues determined by the HAC.

The Superior Court noted that a developer's appeal to the HAC and an abutter's appeal to the Superior Court are both reviewed *de novo*. Therefore, neither appellate route offers greater advantage over the other.

The abutters claimed their appeal of the HAC decision under G.L.c. 30A, §14 is on the record, resulting in a more difficult burden of review. Rising Tide pointed out, however, that the decision of the HAC becomes the decision of the Board if no action is taken within 30 days, therefore, the 40B appeal renders moot the 40A appeal.

The Superior Court agreed with Rising Tide, holding that "[w]hen the plaintiffs and developers filed simultaneous appeals of the Board's decision granting the 28-unit Project under 40A and 40B respectively, the HAC's decision became final as to both appeals under the plain meaning of the statute."

The court went on to state that "the HAC's final determination as to the re-

gional planning issues under 40B thereby trumps any zoning appeals under 40A because the legislature's intent in creating the statute was to encourage communities to develop affordable housing for low and moderate income families and to prevent exclusionary zoning."

The court also said that "once the HAC determines that the Board's decision is 'consistent with local needs' and 'not otherwise uneconomic,' its final decision is binding for both appeals under Ch. 40A and 40B."

Analysis

The Superior Court was faced with the familiar problem created by the dual appellate track contained in G.L.c. 40B.

The court's dilemma was further exacerbated by the fact that the HAC decision altered the underlying nature of the abutter appeal, as the HAC approved a 36-unit project, whereas the abutter appeal was of an approval of a 28-unit project. This dichotomy is a common result of the dual appellate track contained in Chapter 40B, and the Superior Court decision represents a best-effort attempt to rectify the inherent conflict in the statute.

While we believe that the Superior Court's decision represents the proper approach in squaring the conflict contained in the dual appellate track contained in Chapter 40B, it is not certain that this interpretation will be upheld on

appeal. Therefore, a legislative change revising Chapter 40B to direct all appeals of comprehensive permit decisions to the HAC, and, thereafter, further appeals to the Superior Court pursuant to Chapter 30A, is the best solution to this problem.

The issue was discussed by the Housing Appeals Committee Advisory Committee appointed by Gov. Romney in 2003, but no consensus on the issue was reached. Until a single appellate route is created, the courts will continue to be faced with questions on how to proceed with dual appeals of identical issues brought in different forums, which may potentially lead to the application of inconsistent evidentiary standards.

This approach unnecessarily burdens the creation of affordable housing in Massachusetts, while offering no additional substantive protections to abutters, whose regional planning concerns may be addressed as easily by the HAC as they can by the Superior Court. While opponents to moving abutter appeals to the HAC may cite concerns about the frequency in which the HAC rules in the favor of developers, there is no evidence to suggest that abutters have fared any better in appeals to the Superior or Land Court than have the boards of appeal in appeals to the HAC.

The statutory mandate in favor of Chapter 40B developments creates this result no matter which forum hears the appeal.

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MORTGAGE DISCHARGE

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attorney who paid off the mortgage must supply an affidavit (formerly the cancelled check was required) containing the details of the payoff which are spelled out in detail in the new statute.

Section 54D

Chapter 183, Section 54D is a new section, and should be one of the most valuable to closing attorneys. This new provision establishes a procedure for obtaining payoff statements, detailing the parties able to request those statements, the parties responsible for providing them, the dates within which the payoff information must be provided and a payment on the mortgage made, and a penalty for failure to provide a payoff statement.

The payoff statement must enable the mortgagor to conclusively make full payment as of a certain date no more than 30 days from the request. It must be written, and may be transmitted by facsim-

ile or other electronic transmission.

The payoff statement must be given within five days of receipt of the request, in written form, and may be delivered by facsimile or other electronic transmission. The payoff statement must specify the exact amount due to fully pay off the secured debt on the specified date, or an amount sufficient to obtain a partial release.

Information on a method for determining the per diem amount if the payment is not made on the specified date must also be supplied as part of the payoff statement. If payment is made in compliance with the terms of the payoff statement, the party receiving the payment must comply with G.L.c. 183, §55(a), discussed below. The lender may charge for issuing more than one payoff statement during a six-month period.

The penalty imposed by the proposed §54D for the failure to provide a payoff statement within the required five-day

time period is the greater of \$500 or the mortgagor's actual damages, plus attorney's costs and fees.

Section 55

Chapter 183, Section 55 is also completely replaced. One of the most notable changes is the addition of penalties for the lack of compliance with the statute. Until the passage of this bill, real estate attorneys had no means to enforce their requests for a timely discharge as required by the statute.

Section 55(a) (1) requires the recipient of the full payment of a mortgage to cause within 45 days of such receipt: (i) the recording of a proper discharge and provision of a copy of the discharge to the closing attorney, along with the recording information; or (ii) the provision of a proper, recordable discharge to the closing attorney.

It is no longer acceptable for the lender to provide only a copy of the discharge and evidence that the discharge was sent

to the Registry of Deeds. The lender must also verify that the discharge has been recorded, by providing the recording information. If the lender does not record the discharge, but forwards it to someone other than a closing attorney, the lender must attach a copy of the specific recording instructions, as recited in c. 183, §55(a) (2).

Section 55 reiterates the requirements that are spelled out in the proposed new Section 54 as to *record* proof that the entity signing and acknowledging the discharge is authorized to do so, if the entity is not the record holder of the mortgage.

This proof may be supplied by (1) recording information for the documents to demonstrate the authority of the signing entity; or (2) attaching such documentation to the discharge; or (3) providing the closing attorney with the recordable discharge and the recordable documentation (as specified in c. 183, §54) necessary to establish the authority to discharge the mortgage.