

# Superior Court: Housing Appeals Committee loses jurisdiction to hear appeal

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In a decision which, if upheld, could have significant implications on the creation of affordable housing in Massachusetts, the Superior Court ruled that the Housing Appeals Committee loses jurisdiction to hear an appeal brought by a developer pursuant to G. L. c. 40B, § 22, when the mu-

nicipality has approved sufficient affordable housing units to exceed the 10 percent affordable housing requirements imposed by G. L. c. 40B, § 20. *Zoning Bd. of Appeals of Canton v. Housing Appeals Committee*, Superior Court Civ. 2005-01868 (Norfolk, Nov. 10, 2006).

This decision allows the municipality to use the evidence that it has surpassed the 10 percent affordable housing requirement even though it did not approve such units until after the decision was denied by the Canton Board of Appeals and while the appeal was pending at HAC. In order to reach this decision, Judge Charles M. Grabau was required to hold invalid the provisions of 760 CMR 31.04(a), which sets the time of the filing of the Board's decision with the Town Clerk as the appropriate time for determining whether a decision is consistent with local needs.

### Factual background

In October 2001, Canton Property Holding, LLC filed an application for a comprehensive permit with the Board for the construction of 196 units of rental housing and 31 home-ownership units on approximately 81.3 acres of land in Canton. At the time CPH filed its application with the Board, Canton needed 173 affordable units to reach its 10 percent requirement set by G. L. c. 40B, § 20. The Board denied CPH's comprehensive permit application on July 10, 2003, and filed its decision with the Canton town clerk on July 11, 2003. When the Board filed its decision with the town clerk, Canton had not yet surpassed its 10 percent affordable housing requirement.

CPH filed an appeal with the HAC pursuant to G. L. c. 40B, § 22. In preparation for the hearing on the appeal, the parties

executed a Pre-Hearing statement which stipulated that the town's affordable housing percentage was 7.87 percent, less than the 10 percent required by Chapter 40B. The hearing at the HAC began on Oct. 14, 2003, and concluded on March 23, 2004.

On Feb. 13, 2004, the HAC approved a settlement between the Board and another developer which resulted in the approval of 180 new affordable housing units, enough units to exceed its 10 percent affordable housing requirement (CPH, apparently out of concern regarding the impact of the settlement upon its project, appealed this decision to the Superior Court, but later filed a Stipulation of Dismissal on Aug. 4, 2004).

Subsequently, the Board filed a motion to reopen the hearing and a motion to dismiss, based upon the approval of the additional housing units. The HAC denied the Board's motion to dismiss, relying upon 760 CMR 31.04(a), which states "[i]n determining whether the decision of the board is consistent with local needs, low and moderate income housing units shall be counted as of the date of the filing of the written decision in the office of the city or town clerk . . ."

### Superior Court decision

Grabau reviewed the case law interpreting Chapter 40B, noting that once a municipality has met its affordable housing obligations under the statute, "the override power delegated to HAC is extinguished." *Id.* at 5, quoting *Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd. Partnership*, 436 Mass. 811, 824 (2002). The dispute in this case, however, was at what point is the determination made as to whether the Board's determination was "consistent with local needs."

The HAC, following the regulatory provisions of 760 CMR 31.04(a), held that the time for this determination was the time the Board submitted its decision with the Town Clerk.<sup>1</sup> Grabau noted that the Legislature has not spoken with certainty on when consistency with local needs should be determined. However, despite noting that the court was required to give substantial deference to the regulation adopted by the Department of Housing and Community Development, Grabau determined that the intent of Chapter 40B was to return local control to the municipality once it exceeds its 10 percent affordable housing requirement, even if it did not achieve such compliance until some point after the decision of the board.

Grabau noted the reasoning behind the regulation was to incentivize the creation of affordable housing by "eliminating uncertainty as to the date on which compliance with the statutory minimum will be evaluated." However, Grabau went on to state the use of the decision date to determine consistency with local needs "ignores the critical Legislative goal of preserving local autonomy once a municipality had satisfied its statutory minimum affordable housing obligation." As a result, Grabau granted the Board's motion to dismiss. Interestingly, despite the fact that he could not have granted the motion to dismiss without finding the provisions of 760 CMR 31.04(a) invalid, Grabau did not issue a specific order invalidating this regulatory provision.

### Analysis

Grabau's decision seems to place greater emphasis on the preservation of

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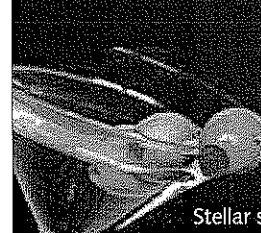
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## Property agent may not represent owner

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Therefore, the Housing Court also reasoned, it would be unfair to hold agents accountable under those regulations but not to permit them to act as owners in other

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legal proceedings.

The tenant appealed and the Supreme Judicial Court granted direct appellate review. Although the Tenant had moved out of the property and the case was moot, the court nevertheless chose to address practice of law issue. The fact that the court did so demonstrates its continuing concern over unauthorized practice of law matters.

In its opinion, the Supreme Judicial

Court agreed that there was "no question" that the property management agent was engaged in the practice of law. However, the court reversed the Housing Court's decision and refused to blur the lines that separate lawyers from non-lawyers.

Both of the rationalizations offered by the Housing Court were rejected on appeal. The Supreme Judicial Court held that where the agent's own legal rights were not at stake in the proceeding, her contract

with the landlord did not permit her to prosecute claims belonging to the landlord. Importantly, the court also held that even if the two administrative regulations did treat an agent as an "owner," neither an administrative agency nor the Legislature had the authority to allow any person to practice law. It concluded that "[p]ermission to practise law is within the exclusive cognizance of the judicial department."

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local autonomy than upon the creation of affordable housing. However, the legislative mandate of Chapter 40B is not to preserve municipal autonomy, but to foster the creation of affordable housing, even at the expense of municipal autonomy. *Board of Appeals of Hanover v. Housing Appeals Committee*, 363 Mass. 339, 355-360 (1973). Grabau seems to acknowledge that uncertainty regarding the date when consistency with local needs will be determined will cause developers to be wary of filing comprehensive permit applications.<sup>2</sup>

Accordingly, the question of the appropriate time to determine consistency with local needs can be seen as one pitting the creation of affordable housing against the preservation of municipal autonomy. In the absence of specific guidance from the Legislature on this question, it appears clear, despite Grabau's decision, that Chapter 40B clearly favors the creation of affordable housing over the preservation of local autonomy. *Id.* at 355-360.

Even if the statutory intent were less clear, specific guidance on this issue was offered by the Appeals Court in *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553, 556-557 (1983), in which the Appeals Court was faced with a claim that a town had met its 10 percent affordable housing requirement.<sup>3</sup> The Appeals Court noted that the HAC could not issue a comprehensive permit once the town had achieved its 10 percent requirement. *Id.* at 556.

The Appeals Court went on to state, however, that "[t]he critical criterion in this case is the first one — whether, at the time of the initial application for a comprehensive permit, low or moderate income housing existed in more than ten percent of the housing units in the latest decennial census of Greenfield." *Id.* at 556-557 (emphasis added).

Given that the standard set by the Appeals Court is less favorable towards local autonomy than the provisions of 760 CMR 31.04(a), it appears that Grabau should have held that the regulation preserved too much local autonomy rather than too little.

### Conclusion

Grabau's decision grapples with the difficult question of whether concerns over local autonomy require municipalities to regain home rule control over comprehensive permit applications as soon as the municipality surpasses the 10 percent affordable housing threshold, or whether concerns regarding the creation of affordable housing prevent the application of the 10 percent threshold to projects which have already completed the local permitting process.

We believe that Chapter 40B clearly favors the creation of affordable housing over local autonomy. Furthermore, the Appeals Court has already ruled that the applicable time for determining consistency with local needs is the time of the filing of the comprehensive permit. Therefore, we believe that the *Canton* case was decided incorrectly.<sup>4</sup>

Hopefully, the Appeals Court will be given a chance to reaffirm its holding in the *Greenfield* case.

### End notes

<sup>1</sup> The HAC has used this regulation in a line of cases holding that the time for determining consistency with local needs is the time of the filing of the decision with the Town Clerk. See, *Casaletto Estates, LLC v. Board of Appeals of Georgetown*, No. 01-12, slip op. at 21 (Mass. Housing Appeals Comm., May 19, 2003). Additionally, the HAC has extended this reasoning in setting the time for determining whether, pursuant to 760 CMR

31.07(i), a municipality has achieved its Planned Production certification. Grabau's decision calls into question whether this interpretation remains valid, or whether the time-frame for determining whether a municipality has achieved Planned Production protection will be re-evaluated.

<sup>2</sup> Grabau noted that the provisions of 760 CMR 31.04(a) "protects developers against investing substantial sums of money into developing affordable housing in a particular town only to see a project rejected as a matter of law if that town reaches the 10 percent minimum at any point in the appellate process."

<sup>3</sup> Significantly, the Appeals Court in this case was also faced with the question of whether the town had approved enough units to exceed its 10 percent affordable housing requirement. *Zoning Bd. of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553, 557-559 (1983). The Appeals Court, using the filing of the comprehensive permit application as the applicable date, held that the town

had not met its 10 percent requirement, because units the town claimed should have been counted, had not yet received building permits at the time of the comprehensive permit application (on December 14, 1979). *Id.* at 559. Presumably, these units had received building permits by the time the Appeals Court issued its decision in 1983, but no claim was made that these units should have been counted if created subsequent to the filing of the comprehensive permit application.

<sup>4</sup> The HAC has recently indicated that it disagrees with Judge Grabau's decision in the *Canton* case. See, *Meadowbrook Estates Ventures, LLC v. Amesbury Bd. of Appeals*, No. 02-21, slip op. at 2 (Mass. Housing Appeals Comm., December 12, 2006). In this decision, after stating that it "respectfully disagrees with the Court's reasoning in *Canton*", the HAC noted that in order "[t]o minimize uncertainty and confusion, the Committee intends to follow the *Georgetown* rule, as codified in § 3.04(1)(a), until the matter has been addressed definitively by an appellate court." *Id.* at 2.

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