

legal

Further Support for Chapter 40B

BY MARK A. KABLACK

The Massachusetts Supreme Judicial Court (SJC) issued the second of two decisions regarding the Comprehensive Permit statute, Chapter 40B, in July 2007. The decision, known as *Town of*



Middleborough vs. Housing Appeals Committee (2007), interpreted the subsidy requirements of Chapter 40B. In particular, the court examined whether project financing through the New England Fund

(NEF) constituted an adequate governmental subsidy within the meaning of Chapter 40B where no other governmental subsidy, program or entity was involved. The SJC ruled in favor of the developer, upholding the prior decision of the Housing Appeals Committee (HAC), despite acrimonious debate between housing proponents and municipal regulators concerning the validity of NEF-financed projects. The *Middleborough* decision follows on the heels of the SJC decision in the case of *Boothroyd vs. Zoning Board of Appeals of Amherst* (2007), which was decided in June 2007 and was the subject of a prior article in this magazine. The two cases continue a favorable line of decisions by the SJC in support of Chapter 40B and the broad legislative purpose of affordable housing production.

When the Legislature first enacted Chapter 40B in 1969, it referenced the requirement of a governmental subsidy for a project to be eligible for a Comprehensive Permit. The Legislature, however, provided no definition of the type of subsidy required and implementing regulations also failed to address the details of subsidy requirements. Initially, subsidies were reflective of broad-based governmental programs at either the state or federal level, where a governmental entity was either directly involved as a project proponent or the principal (if not sole) financier of construction and development costs.

Throughout the 1970s and 1980s there was a shift from the direct governmental subsidy to more “market-driven approaches.” There was less of a direct role for governmental entities and more of a role for non-conventional subsidizing mechanisms. The Grace Commission was formed by the Legislature in 1987 to study the implementation of Chapter 40B and recommend improvements. The commission recommended non-traditional subsidy programs or local initiatives as a viable means of affordable housing production. In response, regulatory changes were made to broadly define the subsidy requirements of Chapter 40B. The term “subsidy” was defined by *Middleborough* to mean “the grant, through a federal or state housing program to assist the construction of low or moderate income housing, including a local housing program approved by the Executive Office of Communities and Development, of direct financial assistance; of indirect financial assistance through insurance, guarantees or other means; of in kind assistance; of technical assistance; or of other supportive services.” The regulatory changes specifically endorsed the Local Initiative Program and similar programs as examples of non-traditional approaches that would qualify under the subsidy requirements of Chapter 40B.

Housing Subsidies

Within the context of this regulatory change, HAC was first asked to examine NEF-financed projects in the case known as *Stuborn (Stuborn Ltd. Partnership vs. Barnstable Board of Appeals)*. In *Stuborn*, HAC read the statute and regulations regarding Chapter 40B liberally in order to effectuate the Legislature’s broad goals and to allow “the entire comprehensive permit process to evolve in the changing world of housing subsidies.” In *Middleborough*, HAC concluded that NEF-financed projects had sufficient characteristics of a government agency to qualify as a federal subsidy.

HAC relied upon its prior ruling in *Stuborn*, when the issues of subsidy quali-

fication were brought again in the *Middleborough* case. In *Middleborough*, an application for Comprehensive Permit was unanimously denied by the local zoning board on a number of grounds, including a concern for adequate frontage and previous designation of the subject property as one on which building could not take place. The developer appealed the denial to HAC. HAC ruled in favor of the developer, overturning the denial and directing the issuance of a Comprehensive Permit for the project. An appeal was brought by the town in Superior Court, where the issue of subsidy requirements for the NEF-financed project was first thoroughly briefed and argued. The Superior Court ruled in favor of the developer and the town brought further appeals first before the Massachusetts Appeals Court and subsequently the SJC. All of the appellate decisions were consistent in finding for the developer, although the Appeals Court decision rejected much of the reasoning of *Stuborn* in its decision.

In the July 2007 decision, the SJC thoroughly reviewed the structure of NEF-financed projects, and upheld findings previously rendered by HAC in *Stuborn*. The SJC recognized that the Federal Home Loan Bank of Boston (FHLBB) is one of 12 regional banks comprising the Federal Housing Finance Board. The FHLBB is federally chartered, supervised by the Federal Housing Finance Board, and its capital, reserves, advances, surplus, income, and loans are all exempt from federal, state and local taxation. Under the NEF program, FHLBB advances public funds to a member bank, which in turn makes a construction loan to a developer at below-market interest rates. The loan is designed to advance the legislative purpose of supporting and stabilizing the financing of residential housing. According to *Middleborough*, these criteria were sufficient in the opinion of the SJC to create a governmental subsidy within the meaning of Chapter 40B. In rendering its decision, the SJC found that the Appeals Court should not have repudiated the HAC reasoning in *Stuborn*. “[Chapter 40B] and its regu-

lations permit many kinds of government subsidies, and we disagree with the Appeals Court's rejection of [HAC's] more expansive interpretation of the fundability requirements of [Chapter 40B]."

It is interesting to note that the *Middleborough* decision was issued in connection with a project sponsored under the "old" NEF program, where there was no state-level review or monitoring. Current, or "new," NEF projects require that a state-ap-

proved entity must both approve a project's eligibility and monitor compliance with affordable housing requirements. The SJC concludes in a footnote reference that if the "old" NEF projects pass muster, so too must the "new."

The SJC's decision in *Middleborough* is a further example of how the highest court in Massachusetts appears poised to defend the broad policy-based goals of affordable housing under Chapter 40B. The SJC's deference

to the regulatory process and to the decisions by HAC should provide some comfort to developers involved in current disputes with municipalities over Chapter 40B. This comfort level quickly dissipates, however, under the current threat to repeal Chapter 40B by petition and ballot referendum. ♦

Mark A. Kablack (www.Kablacklaw.com) is a real estate lawyer with specialties in land-use law and real estate development.