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legal

Another Positive Decision for 40B

By Mark A. Kablack

The close of 2007 brought more positive news for 40B development. Shortly before the press release that the anti-40B coalition failed to muster the petition signatures needed to proceed in its repeal effort, the Massachusetts Supreme Judicial Court (SJC) issued another significant ruling regarding 40B. The decision, *Jepson v. Zoning Board of Appeals of Ipswich*, examined whether a zoning board may override local zoning requirements when commercial use is proposed within an affordable housing development. This decision is the third SJC decision I have reported on over the last several months. Once again, the SJC has responded to 40B controversies in a favorable way, affirming the legislative goal of affordable housing production and endorsing flexible development proposals to achieve that end.

The *Jepson* case involved a proposal by the YMCA to build 48 residential units of affordable housing on property in Ipswich. The proposal involved the construction of two separate buildings, each with three stories. One building consisted of 30 apartments on property for which the underlying zoning was for residential use. The second building consisted of 18 apartments, together with 8,220 square feet of commercial space, on property for which the underlying zoning was for business use. All the commercial space was proposed on the first floor of the building. The YMCA proposed a child care facility that would occupy approximately 3,970 square feet, or roughly half, of the proposed commercial space. The balance of the commercial space would be occupied by a bank, coffee shop and other similar establishments. The YMCA planned to own and operate the child care facility, but the remaining commercial uses would be sold as condominium units to one or more third parties. While the commercial uses were permitted by right within the underlying business zone, the proposed building violated the front and side yard setback requirements for the underlying zoning district. The YMCA requested that the zoning board grant relief from these local zoning requirements as part of its Comprehensive Permit application. The zoning board issued a Comprehensive Permit, permitting the construction of the proposed buildings, including the commercial uses, and imposed numerous conditions, some of which restricted the type and nature of the commercial uses.

Controversy arose in the *Jepson* case over several matters. Two abutters, one an individual and the second a local housing authority, appealed the issuance of the Comprehensive Permit to Superior Court. The abutters claimed that the zoning board should not have issued the Comprehensive Permit for several reasons. The abutters were concerned about local wetland and stormwater issues that could exacerbate flooding problems in the area. On a more interesting note, however, the abutters claimed that the zoning board was without jurisdiction to issue any relief as to the proposed commercial space. The abutters claimed that a zoning board may only waive local requirements for those elements of a project that related directly to affordable housing. The abutters further claimed that relief for the commercial space could only be obtained through the normal channels afforded for non-40B developments (e.g. a variance).

Both issues were addressed by the Superior Court, together with issues of whether the two abutters had proper standing to bring the appeal. On cross motions for summary judgment, Judge Diane Kottmyer of the Superior Court upheld issuance of the Comprehensive Permit, finding in favor of the YMCA for the mixed-use development as proposed. The abutters sought additional appellate review and the SJC assumed direct appellate review on its own motion.

Particularly Noteworthy

While the SJC decision in *Jepson* is interesting on several levels, dealing with issues of standing and wetland/flooding mitigation, the decision is particularly noteworthy with respect to the proposed mixed-use development. There are only a handful of 40B developments in Massachusetts where development includes a mix of residential and commercial uses. However, the SJC found that there is nothing in Chapter 40B that "expressly prohibits the inclusion of incidental commercial uses (when such uses are permitted on the proposed property by zoning ordinance or bylaw) to complement an affordable housing development." The SJC went further to hold that 40B must be flexible in such a way as to promote affordable housing by providing economic incentives to developers, and mixed-use development is just one example of the type of flexibility that is necessary and appropriate. The SJC affirmed the Superior Court decision and upheld the granting of the Comprehensive Permit for the mixed-use development as proposed. Citing to it the decision in *Standerwick v. Zoning Board of Appeals of Andover* (2006), the 40B statute "reflects the Legislature's considered judgment that a crisis in housing for low- and moderate-income people demands a legislative scheme that requires the local interest of a town to yield to the regional need for the construction of low- and moderate-income housing, particularly in suburban areas."

The *Jepson* decision is a welcome one and will be useful for those 40B projects where mixed-use development makes sense. The decision, however, has limits. First, it was critical, as noted

in the citation above, that the commercial-use component of the project was incidental to the overall affordable housing development. This only makes sense given that the purpose of 40B is to create housing, not commercial space. Second, it was equally critical to the *Jepson* decision that the proposed commercial use was permissible in accordance with the underlying business zone. The relief afforded by the zoning board was dimensional relief, relief that would otherwise have been granted for the proposed building even if the proposed building consisted entirely of affordable housing. The question of whether 40B will allow for mixed-use development where the underlying zone limits or prohibits commercial use is not yet answered and will need to be tested by future developments.

The Department of Housing and Community Development (DHCD) is poised to enact a comprehensive set of new regulations regarding 40B. I expect that we will report on these new regulations in future editions of this magazine, as final promulgation is scheduled for February 2008. Preliminary drafts of these new regulations indicate that DHCD is willing to codify the ruling in *Jepson*, recognizing that mixed-use 40B development may be appropriate in certain instances. The new regulations, however, will likely not expand the scope of the *Jepson* ruling.

The *Jepson* decision is another recent example that the SJC recognizes the important and unique role 40B provides for the development of low- and moderate-income housing in Massachusetts. The recent SJC decisions, and the welcome news that the repeal petition has failed, provide a promising outlook for 40B development in 2008. ◆

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