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Legal

The Woes of Woburn

By Mark A. Kablack

The Massachusetts Supreme Judicial Court has issued its latest ruling on matters involving the interpretation of Chapter 40B, and it does not bode well for projects burdened with locally imposed conditions. The recent ruling in the case *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581 (2008), is the latest in a string of SJC decisions issued this spring involving the 40B program. Contrary to many earlier decisions that were, on the whole, supportive of the 40B program, the current decision upholds the Town of Woburn's position, requiring a substantial reduction in unit density over that proposed by the developer and supported by the Housing Appeals Committee (HAC).

The Woburn case has a complicated procedural history and is probably a classic situation of how a bad set of facts can result in bad law. The project as originally proposed called for the development of 640 residential units on a 74 acre parcel in Woburn owned by Northeastern University. The residential units were initially proposed in 32 buildings, each with 20 units, together with accessory structures and amenities, including a 5,500 sq. ft. recreation center. This initial proposal was reviewed by the Woburn Board of Appeals over the course of 12 months, and 9 public hearings, and resulted in an approval with more than 50 enumerated conditions. One of the conditions was a requirement that the project be limited to just 300 units (less than half of what was originally proposed).

In light of the conditional approval, including the drastic reduction of unit density, the developer pursued an appeal to HAC. HAC conducted an intense factual investigation of the project, and concluded that the 640-unit proposed development was "too large [and] impos[ed] significant burdens on the surrounding community." HAC looked to the underlying agreement of sale between Northeastern University and the developer, including a provision regarding the carrying capacity of the project site, and concluded that a 420-unit project was more in keeping with local needs.

HAC's ruling resulted in successive appeals to Superior Court by both the developer and the Board of Appeals over the density issue and the ability of HAC to establish a different unit count from what was proposed (640 units) or approved (300 units). The Superior Court ultimately ruled that while HAC had the ability to prescribe a new unit density, the decision in favor of 420 units was unsubstantiated. The case was remanded to HAC for further analysis on unit count, at which time the developer proposed two different design alternatives, each with 540 units of development. In 2005, now almost five years after the initial application to the Board of Appeals, HAC ruled that a 540-unit plan was consistent with local needs. HAC ordered the Board to issue a Comprehensive Permit for a 540-unit plan, not specifying which one of the two alternatives proposed by the developer was to be permitted.

The second HAC decision resulted in further appeals by both the developer and the Board of Appeals to Superior Court. The Board argued in part that the alternative plan proposals for 540 units constituted a "substantial change" under the applicable regulations in effect at the time, which substantial change required a threshold hearing and Board review that could not be usurped through the appeal process. The Superior Court rejected this argument, and concluded that HAC had finally gotten it right. The Superior Court found that the 540-unit proposal was reasonable and consistent with local needs, supported by substantial evidence, and that the Board could (under the remand order) determine which of the two developer proposals it would permit.

When further appeals were requested, the SJC assumed direct appellate review of the final Superior Court decision in early 2007. The core of the case before the SJC regarded whether HAC exceeded it statutory authority when it revised the conditions imposed by the Board of Appeals, increasing the unit density from 300 units to 540 units. Specifically, the SJC examined whether HAC had such authority in the instant case where the reduction in unit density did not make the project, on the whole, uneconomic.

Chapter 40B provides that a developer may appeal to HAC when (i) a project is denied; or (ii) a project is approved with conditions that render a project uneconomic. If an appeal is brought under clause (i), HAC may explore whether the denial is supported by a local concern that outweighs the regional need for affordable housing. In other words, HAC may conduct a balancing test to determine whether an enumerated condition fulfills a proper local goal of securing public health, safety and/or welfare, and further, whether such goal trumps the stated need for more affordable housing. If an appeal is brought under clause (ii), HAC never gets to the balancing test, unless the developer first proves that the imposed conditions are uneconomic.

The distinction between clauses (i) and (ii) as noted above can be blurred, when, in the instant case, a developer argues that a conditional approval constitutes a *de facto* denial. In fact, HAC proceeded in its review in the *Woburn* case as if the project had been denied

by the Board of Appeals, because it believed that the conditional approval, reducing the number of units proposed to less than half, was the functional equivalent of a denial. HAC argued, based on its position in an earlier decision entitled: *Settlers Landing Realty Trust v. Barnstable Board of Appeals*, HAC No. 01-08 (Sept. 22, 2003), that "an arbitrary reduction in the number of units may constitute a denial of a permit," and that "when a developer challenges a board decision that significantly reduces the number of units in the development, the appropriate course is to review the decision to determine whether it manifests a reasonable bases for the reduction."

Unfortunately for the development community, the SJC ruled against HAC on its scope of review when there is *de facto* denial. While the SJC will defer to an agency's interpretation of statutory and regulatory provisions, deference is limited when the law is unambiguous. In the SJC's opinion, Chapter 40B is clear that a functional or *de facto* denial may only be successfully appealed by a developer, when the developer is able to prove that one or more of the imposed conditions render the project uneconomic. Absent such proof, HAC is without jurisdiction to reach the balancing test of whether conditions are reasonably linked to proper local concerns, and whether such concerns outweigh the statewide need for affordable housing. The SJC ultimately held in *Woburn* that the original conditional approval, with reduction in density from 640 units to 300 units, should remain intact.

In a concurring opinion, Chief Justice Marshall recognizes the unfortunate potential for municipalities, in light of the *Woburn* decision, to attempt to "stymie the construction of an affordable housing project" by drastically reducing density or otherwise imposing onerous conditions, without actually denying a project. According to *Woburn*, such bad behavior is "unfettered," because, without an uneconomic finding, a developer's appeal would be immune from review by HAC. Chief Justice Marshall continues by stating that HAC should properly have the authority to conclude that a "reduction is unjustified and that a project of a larger size than allowed by the board would be consistent with local needs."

It is interesting to note that *Woburn* was decided with full knowledge of the recently implemented DHCD regulations regarding Chapter 40B (760 CMR 56.00). While the new regulations continue to provide for appellate review by HAC on the basis of a *de facto* denial (see 760 CMR 56.06(5)(b)(5)), such review is now clearly limited in light of the Woburn decision.Chief Justice Marshall strongly suggests, in her concurring opinion, that DHCD currently has the regulatory authority to further expound upon and define standards for economic return. Such authority should be exercised promptly, in order to re-establish the vital role of HAC in the review of overly burdensome and ill-intended conditions of approval. It is imperative for DHCD to heed this suggestion. ◆

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