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Local Needs Test Upheld By SJC

By MARK A. KABLACK

In a decision issued in June 2007, the Massachusetts Supreme Judicial Court (SJC) has once again affirmed the broad legislative intent and goal underlying the comprehensive permit statute, Chapter 40B



(also known as the Anti-Snob Zoning Act). The case, known as *Boothroyd v. Zoning Board of Appeals of Amherst* (2007), was heard by the SJC on its own motion for a direct appeal. *Boothroyd* affirms a prior ruling of the Land Court

and clearly preserves the reach of the comprehensive permit statute for those cities and towns who wish to continue to develop affordable housing. Under the *Boothroyd* decision, cities and towns may continue to issue comprehensive permits, relaxing and/or waiving zoning regulations and other local permitting requirements, even when the minimum affordable housing levels have been reached (i.e. low- or moderate-income housing exists at levels in excess of 10 percent of the housing units reported in the last federal decennial census).

The comprehensive permit statute was enacted in 1969 to create affordable housing for low- or moderate-income residents of the commonwealth. The statute was designed to encourage such housing throughout all cities and towns, in order to provide for integrated and de-stigmatized housing stock. Furthermore, in order to avoid the locally driven, regulatory burdens that may be imposed upon new housing production, the comprehensive permit statute was designed to have one local board (the Zoning Board of Appeals) sit and hear a comprehensive application, with the ability to override all local requirements and regulations. In rendering its permitting decision, a Zoning Board may only impose requirements and regulations that are consistent with local needs. Such requirements and regulations must be reasonable in view of the regional

need for low- or moderate-income housing.

The issue in *Boothroyd* is whether a city or town may continue to make use of the broad, sweeping powers of a comprehensive permit, even when minimum affordable housing levels have been achieved within the municipality. When minimum affordable housing levels are not met, a city or town must entertain a comprehensive permit application, whether sponsored locally (through a so-called friendly comprehensive permit application), or not (a developer-/owner-sponsored application without local support). Once the minimum target housing levels are achieved, however, a city or town has much more discretion and may reject a comprehensive permit application. A developer or owner who tries to force a 40B project without local support under such circumstances clearly runs the risk of rejection. A developer or owner who proposes a 40B project with local support under such circumstances should be on a more successful path. Prior to the *Boothroyd* case, however, this path could be obstructed by arguments that get to the core jurisdictional issue of whether a Zoning Board still has jurisdiction to issue a comprehensive permit.

In the *Boothroyd* case, a nonprofit developer proposed to build 26 units of affordable rental housing on a 4.1-acre parcel in the town of Amherst. At the time of the proposal, Amherst had fulfilled its minimum affordable housing obligation under the comprehensive permit statute. Nevertheless, the Zoning Board, after conducting numerous meetings and hearings on the project, voted unanimously to grant the comprehensive permit subject to conditions. In its decision, the Zoning Board determined that the “need for affordable housing in Amherst was not mitigated by the fact that the town had met its minimum affordable housing obligation.” The board took an expansive view on affordable housing needs and “concluded that the overwhelming need for affordable housing outweighed concerns about density, traffic and other constraints imposed by the zoning bylaw.”

A group of residents, including some immediate abutters to the proposed rental housing project, challenged the Zoning Board’s decision. Citing numerous grounds for overturning the decision, the resident group sought an appeal to Land Court. In particular, the residents claimed that the Zoning Board was without authority to override restrictive zoning laws (and issue a comprehensive permit) once the minimum affordable housing obligation in the town of Amherst had been met. On appeal, the Land Court judge entered judgment in favor of the Zoning Board and the housing project. The judge decided that the same standard, whether a zoning bylaw was consistent with local needs, “applies in situations where the town’s affordable housing stock is either below, or over, the 10 percent statutory threshold.” This became the crux of the issue on appeal to the SJC. The resident group argued that the Zoning Board could not impose a regional needs test, and override local zoning bylaws, once the minimum affordable housing obligation was met within the town. According to the resident group, the Zoning Board’s only authority to issue a comprehensive permit for the project would be in a manner consistent with the local bylaws, imposed in the usual way, with relief provided by special permit or variance only.

In *Boothroyd*, the SJC could not have been more clear or convincing in its support of the lower Land Court decision or of the comprehensive permit statute itself. The decision, authored by Justice John Greaney, concluded that the resident group was taking a far too literal and strained view of the statutory wording in order to support its position. The SJC found no basis in the statutory text or in prior decisions, citing to *Board of Appeals of Hanover v. Housing Appeals Comm.* (1973), that would limit a board’s authority to relax local bylaw requirements in instances where there was still an identifiable housing need. Justice Greaney held that the plain meaning of the statute supports a local board’s ability to grant a comprehensive permit even when a municipality meets its minimum afford-

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able housing obligation. He concluded that this expansive interpretation is bolstered by the central, overriding concern of the [comprehensive permit statute], consistency with local needs: “A municipality attainment of its minimum affordable housing obligation in many cases does not eliminate the need for

affordable housing within its borders.”

The *Boothroyd* case is the most recent SJC decision in a series of cases that have consistently upheld the validity of the comprehensive permit statute. The ruling will be important for those developers and owners who are proposing a 40B project in a municipality that has met its minimum affordable housing quota. The ruling will limit the ability of abutter groups from bringing further appeals in such instances. However, devel-

opers and owners should be mindful that the *Boothroyd* decision still leaves discretion in control of the local board. There are not many municipalities in the commonwealth like Amherst willing to entertain a 40B project after the minimum affordable housing quota has been met. ♦

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