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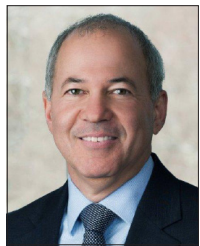
## Affordable Housing Law Trumps Municipal Master Plan

Defending 40B Denials Might Be Getting More Difficult

BY BRIAN C. LEVEY

SPECIAL TO BANKER & TRADESMAN

In yet another in a string of recent decisions favorable to the development community,



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the construction of a large rental project under Chapter 40B, the comprehensive permit law, was upheld notwithstanding its location on the lone vacant lot in an otherwise fully developed industrial park. Reversing the local zoning board's denial of the developer's 40B application, the Housing Appeals Committee (HAC) issued its decision in *Hanover R.S. Limited Partnership v. Andover Zoning Board of Appeals*, "to clarify the standard" it applies in determining when a local master plan can block a Chapter 40B project. In so doing, the HAC may have signaled an increasing unwillingness to reverse a Comprehensive Permit denial as the shortfall of affordable units continues to grow.

The developer sought to build a 248-unit mixed-income rental housing project on a 10-acre site, the last vacant parcel on a dead-end boulevard in an industrial park already populated by 10 businesses. Located in Andover's Industrial D zoning district, residences were otherwise prohibited at the site under the local zoning bylaw. After the Andover Zoning Board of Appeals (ZBA) denied an application for Comprehensive Permit, an appeal to the HAC followed.

Having denied the permit request, the ZBA was faced with proving that a valid local concern existed and that it outweighed the regional need for affordable housing. Under state regulations, a municipal master plan can be a legitimate "local concern" only if it was legitimately adopted and still operates as a viable planning tool; promotes affordable housing; and actually has been implemented in the area of the proposed affordable housing site. Since this three-part test is not considered a high bar for the municipality to meet, the real focus of these disputes turns on balancing the particular interest of the master plan with the regional need for affordable housing.

**Pushing For Affordable**

Where a municipality's affordable housing stock is below 10 percent – which is the case in most cities and towns – this is "compelling evidence" that regional housing needs trump any local objections. Constructed this way, the state has firmly and intentionally pressed its finger on the scale, tipping it in favor of affordable housing from the get-go.

Here, the balancing test crystallized around whether the town's prohibition on residential uses in the Industrial D district outweighed regional housing needs. The ZBA made a valiant showing. It convinced the HAC that actual conflicts did exist between Andover's planning concerns and construction of housing at the site. The proposed 40B project did not promote either land use planning interests in developing all lots in the park for commercial or industrial uses, the existing office and industrial uses, or maximum tax valuations. The HAC also agreed that Andover had a solid history of planning, and the master plan had met with some success in growing affordable housing: Andover was hovering around the benchmark 10 percent minimum affordable housing stock. More than 1,300 units of low- and moderate-income housing had been created and 16 comprehensive permits had been approved over the last 30 years.

Notwithstanding this showing, the HAC found that the town fell short of meeting its burden. In so doing, it relied heavily on one simple fact – the town's housing stock had

less than 10 percent affordable units. The HAC concluded that the "town's failure to meet its statutory minimum 10 percent housing obligation 'provides compelling evidence that the regional need for housing does in fact outweigh the objections to the proposal.'"

In a potentially ominous signal to municipalities, the HAC went on to opine that the "relatively low goal of 10 percent is a minimum, and that well more than 10 percent of most communities' housing stock would need to be low or moderate income housing in order to satisfy the growing need for affordable housing."

Future cases will determine whether this language represents the HAC's self-styled "clarification" that as the commonwealth's affordable housing deficit continues to rise, it will become increasingly difficult for municipalities with less than 10 percent affordable housing to successfully defend the denial of a 40B application. ■

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