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HOUSING FRONT

## Court Rulings Bolster Affordable Housing Developments

Fire Chiefs' Objections, Fiscal Impacts Can Be Overcome

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SPECIAL TO BANKER & TRADESMAN

After a long hiatus, the Supreme Judicial Court recently spoke on the reach of the Massachusetts' Affordable Housing statute, General Laws Chapter 40B, and the results bode well for the commonwealth's multifamily developers looking to build affordable housing to meet the current market demand.



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Within one week, the court dispensed with multiple municipal challenges to 40B projects in *Zoning Board of Appeals of Lunenburg v. Housing Appeals Comm.*, and *Zoning Board of Appeals of Sunderland v. Sugarbush Meadow*, paving the way for the issuance of comprehensive permits for 146-unit and 150-unit projects.

In both cases, the court rejected the local zoning boards' claim that the availability of low-cost, market-rate, unsubsidized housing in those towns trumps the need for the affordable housing project. Reviewing the board's denial, the Housing Appeals Committee (HAC) balances local concerns against the regional need for housing. Here, the HAC ignored the availability of low-cost unsubsidized housing when it undertook this analysis. However, the boards' argument failed because it conflicted with the very terms of the chapter 40B, that concerns only "housing subsidized by the federal or state government under any program ..." Availability of units at prices comparable to those controlled under subsidy programs cannot, as a matter of law, thwart a 40B affordable housing project.

Nor does the presence of a municipal master or comprehensive plan spell doom for an affordable housing project. The court tacitly approved a rigorous test for these local plans outlined by the HAC: An initial determination of whether the master plan is a legitimate

local concern based on a three-part inquiry and a second determination of the weight to be given to the master plan based on a two-part test.

Although the master plan in *Lunenburg* was found to be bona fide, the court rejected the notion that the plan outweighed the regional housing need since it had yielded no affordable units in years and had not targeted the 40B project site for a use inconsistent with the project. Even a bona fide master plan does not automatically block a 40B project.

Focusing on the HAC's and local zoning board's broad authority over all zoning and planning issues when considering a 40B application, the court held also that they have the authority to waive both zoning violations or violations of a planning board's prior approval.

In *Lunenburg*, one parcel of the larger project site which provided vital access to the public sewer contained a portion of a building straddling the common boundary between the project site and the adjoining landowner's property. This condition had been approved by the planning board when the project parcel and the adjacent land were in common ownership. However, the court nonetheless found that the power of the HAC and local board over zoning and planning considerations empowered the waiver of the violation of both the zoning setback and the terms of the planning board's permit. This far-reaching authority is an invaluable aid to multifamily developers faced with permitting challenging sites.

### Fire Chief Questioned

The court in *Sunderland* rejected the claim that fire safety concerns outweigh the regional need for affordable housing. It found that the additional risk to occupants and firefighters created by the inability of firefighters to gain direct access to the building's rooftop was minimal in light of the building's

advanced sprinkler system and the likelihood that an abutting town's ladder truck would be made available. Moreover, skepticism of the fire chief's testimony was justified where the town's zoning bylaw allowed 45-foot tall buildings by special permit. Significantly, the court held that, "A fire chief does not have unbridled discretion effectively to deny a comprehensive permit by refusing to approve fire construction documents based on the height of a proposed building and the absence of a town ladder truck [rather,] the board in reviewing such application has the 'same power to issue ... approvals' as the fire chief." Objections from the fire chief, often thought to be fatal to the success of 40B projects, can be overcome.

Adverse fiscal impacts on the town were also rebuffed as a legitimate basis for complaint by the *Sunderland* court. Despite claims that the 40B project would force the town to hire two additional police officers and two additional firemen and would likely increase by more than 50 students the number of school-aged children, these impacts were irrelevant to balancing local concerns and the regional need for affordable housing, the court said.

Under the 40B regulations, such fiscal impacts "may be considered only where there is evidence of unusual topographical, environmental, or other physical circumstances which make the installation of the needed service prohibitively costly."

Where the board failed to make such showing, its fiscal impact concerns were properly disregarded. Alleged fiscal impacts should not often halt a 40B project, given the difficult burden of proof faced by cities and towns. ■

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