



PROHIBITING DENIAL BY DELAY: THE SUPREME JUDICIAL COURT PROTECTS SUBSIDIZED HOUSING FROM APPEALS BY TOWN OFFICIALS

By Paul D. Wilson and Benjamin B. Tymm

As any Massachusetts resident who keeps current on the local news knows, the commonwealth’s Anti-Snob Zoning Act, M.G.L. c. 40B, §§ 20-23, commonly known as Chapter 40B, has become a lightning rod for controversy in many Massachusetts cities and towns. The political battle over this statute, which was crafted by the legislature 34 years ago to promote affordable housing by creating a uniform, mandatory and

unconventional “comprehensive permit” process, is being waged with particular vigor in suburban communities across the eastern part of the state where the demand for affordable housing is great, developable land is scarce and the long-cherished tradition of home rule is strong. As demonstrated time and again over the past few years, this volatile combination of demographic and political realities can make for unusually rough sledding for affordable housing

developers bringing Chapter 40B applications in these suburban towns.

In response to growing pressure from local officials and other citizens disgruntled with Chapter 40B, suburban legislators have taken up the anti-Chapter 40B cause at the State House, filing many bills that would tinker with Chapter 40B, or even wipe Chapter 40B off the books entirely. So far, Chapter 40B has emerged largely unscathed, as the changes to the law have been confined to some regulatory softening.

Because the legislature has declined to perform major surgery on Chapter 40B, town officials have sought relief from the judicial branch — even in the face of the Supreme Judicial Court’s warning last year that “[t]he solution to [a perceived Chapter 40B] problem ... lies with the Legislature.” *Zoning Bd. of Appeals of Wellesley v. Ardmore Apartments Ltd.*, 436 Mass. 811, 828 (2002). Some recent municipal tactics intended to frustrate the development of affordable housing have been clever enough to earn the admiration even of jaded developers’ counsel. For example, a year ago, in a case in which the authors of this article represented the developer, the Natick Zoning Board of Appeals tried to justify a comprehensive permit denial by arguing that Chapter 40B does not even apply in Natick because Natick has already met its statutory obligations under Chapter 40B by devoting 1.5 percent of its developable land area to affordable housing. See M.G.L. c. 40B, § 20.

At an evidentiary hearing before the Housing Appeals Committee, it soon became obvious how a town with only half of the statutorily required subsidized units managed to cover all of its statutorily required land area with those units. As “low or moderate income housing sites,” Natick was counting all 97 acres



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Wilson and Tymm represented the permit applicant who prevailed in Planning Bd. of Hingham v. Hingham Campus LLC, as well as the developers in other subsidized housing cases mentioned in this article.



occupied by two condominium complexes, even though 1,140 of a total of 1,149 units in those complexes were market rate condominiums. In what was, not surprisingly, a case of first impression, the Housing Appeals Committee ruled that Natick had not satisfied its Chapter 40B obligations. *Cloverleaf Apartments, LLC v. Natick Bd. of Appeals*, No. 01-21 (Housing Appeals Comm. March 4, 2002). Thus, municipalities can no longer dream of escaping Chapter 40B simply by purchasing one condominium unit in a large complex, devoting it to affordable housing, and then engaging in creative accounting.

In other towns, where the Zoning Board of Appeals (“ZBA”) actually has granted comprehensive permits, disgruntled town officials have used a blunter weapon. In at least five other cases (two of them very well known to the authors of this article, who served as developer’s counsel in these cases), the ink was not even dry on the comprehensive permit before other town boards or officials raced off to court to appeal that permit, in the hope that delays inherent in the court system might kill the proposal. Now, however, the Supreme Judicial Court has called a halt to that particular municipal obstructionist tactic in *Planning Bd. of Hingham v. Hingham Campus LLC*, 438 Mass. 364 (2003).

The Hingham Campus case

This account of the *Hingham Campus* case — which, in the interest of full disclosure, is written by the lawyers who represented the developer, Hingham Campus — is not just about the Supreme Judicial Court’s ultimate holding in the case, but also about the unusually fast track that the case traveled to get before the SJC. For many projects, especially subsidized housing developments built on thin profit margins, the delays brought on by litigation can be so costly as to spell the project’s doom. Therefore, for Hingham Campus, the speed with which it could get the Hingham Planning Board’s appeal favorably, and finally, resolved was of great importance. Given that the developer was arguing that obstructionist town officials could not be allowed to kill subsidized housing developments by using the delay inherent in court proceedings, it would be ironic if Hingham Campus were forced to abandon its project because municipal officials

with no standing had kept the permit tied up in the court system too long.

The battle against time

In the fall of 2000, Hingham Campus LLC submitted an innovative comprehensive permit application to the Hingham ZBA, using Chapter 40B for the first time in the permitting of a mixed-income continuing care retirement community. The application raised the interesting question of how to think about “affordability” in the context of a continuing care retirement community that would provide its residents with far more than just a place to live — meals, perhaps assisted living services, maybe even nursing home care if necessary — and that charged a refundable six-figure entrance fee as some security that it would be paid for such services when and if the time came. Many seniors, living on fixed incomes modest enough to make them eligible to live in a traditional affordable apartment complex, own and live in houses that they intend to sell as they get older, and the sales proceeds would provide them with the wherewithal to pay the refundable deposit. The Hingham Campus proposal was welcomed in Hingham as an inventive response to the growing housing and continuing care demands of this unique population. But what of modest-income, no-asset seniors? The solution worked out by Hingham Campus and the ZBA was elegant: Hingham Campus would reserve 27.7 percent of all units for persons of low income and moderate income, and, in addition, Hingham Campus would set up a revolving multi-million dollar fund, sized based on expected demand, to subsidize the entrance fees of those modest-income applicants who could not afford the entrance fees.

This resolution evolved over a nine-session public hearing before the ZBA that spanned 10 months. Under Chapter 40B, the ZBA grants one “comprehensive” permit covering all local approvals, but seeks input from its sister boards. See M.G.L. c. 40B, § 21. Other town officials played an active role in the Hingham Campus hearing, and ultimately everyone in town government was apparently satisfied with the various compromises reached by Hingham Campus and the ZBA — except some members of the Planning Board. Those members decided to appeal the permit.

The Planning Board said it was appealing because the ZBA had declined to impose one — and only one — of its recommended conditions on the permit, concerning the affordability issue. However, it soon became obvious that the Planning Board simply did not like the Hingham Campus proposal; it was too dense, too tall and inappropriately sited, the Planning Board argued in its Supreme Judicial Court brief. Thus the Planning Board joined the long line of municipal officials opposed generally to the idea of subsidized housing in *their* town being built under Chapter 40B and therefore not in compliance with the town’s zoning. But, in fighting this age-old battle the Planning Board adopted the latest municipal technique to stop such a development: appeal the comprehensive permit issued by its sister board to the courts, and hope the delay will prove fatal.

Delay is indeed a very serious problem for a subsidized housing developer, always saddled with carrying costs for the land, and sometimes faced with upcoming contractual deadlines to commit millions of dollars that lenders may not be willing to provide without a “final” permit. Facing a stalled development and mounting carrying costs brought on by the Hingham Planning Board’s appeal of this already profit-limited project, Hingham Campus easily could visualize the fulfillment of Appeals Court Justice Kass’s 20-year-old prophecy with respect to contested affordable housing projects: “[D]elay is often as effective as denial,” Justice Kass opined in a seminal Chapter 40B case, and “[in] chapter 40B proceedings, it could ... be more effective than denial.” *Milton Commons Assocs. v. Board of Appeals of Milton*, 14 Mass. App. Ct. 111, 117 n.2, *review denied*, 387 Mass. 1101 (1982).

So that the recalcitrant town officials would not prove Justice Kass prescient, eight days after the Planning Board filed its lawsuit in October 2001, Hingham Campus and the Hingham ZBA filed motions to dismiss the Planning Board action for lack of standing. These motions were later supported by an *amicus curiae* brief submitted by the Affordable Housing Business Coalition (AHBC), a group of approximately 40 businesses and not-for-profit organizations that seeks to maintain and increase the supply of affordable housing in Massachusetts.

Despite the prompt filing of motions to dis-



miss and the rapid marshalling of support of its position in the affordable housing community, Hingham Campus was looking at a many-months-long delay in being heard because of the burgeoning Land Court docket — at a time when it was down to three judges. Therefore, Hingham Campus, joined by the Hingham ZBA, filed a motion for an expedited hearing with the Land Court. The Hingham Planning Board, revealing that it had adopted the “delay equals denial” rationale as its overarching strategy, opposed the joint motion to expedite. Despite the understaffing in his court, Land Court Chief Justice Kilborn granted the joint motion to expedite the case, and he himself heard argument on the motion to dismiss four weeks after it was filed. Then, after an hour of argument by all parties, including the amicus AHBC, Chief Justice Kilborn ruled *from the bench* and granted both motions to dismiss for lack of standing. In his written decision, Chief Justice Kilborn disposed of the standing issue succinctly, holding that “the General Court drew a clear line regarding who has standing under chapter 40B [and] the planning board has no standing” because it does not qualify as a “person aggrieved.”

Undeterred by its lightning-quick (by Land Court standards) and decisive defeat, the Hingham Planning Board appealed the ruling, thus ensuring further delay in the construction of the Hingham Campus development — and further financial losses that threatened to make the Land Court ruling a merely Pyrrhic victory. So, in early 2002, after assembly of the record and docketing of the appeal with the Appeals Court, Hingham Campus sought to accelerate the appellate process as well. With the Hingham ZBA, Hingham Campus filed a joint application for direct appellate review by the Supreme Judicial Court. As at the Land Court, Hingham Campus and the ZBA were able to attract the support of the state’s affordable housing community — this time including the only statewide affordable housing organization in the commonwealth, the Citizens’ Housing and Planning Association (CHAPA), which joined the AHBC in submitting an amicus brief in support of the application for direct appellate review. In rallying to the cause of Hingham Campus and the Hingham ZBA, AHBC and CHAPA saw an opportunity to

put a stop to the dangerous precedent and increasingly popular municipal practice of using the courts to stall a Chapter 40B project.

The Supreme Judicial Court granted the application for direct appellate review in April 2002. Gratified by the quick progression from lawsuit filing to SJC docket, but ever mindful of the precarious financial position that still existed as long as the case remained on appeal, Hingham Campus filed a motion for expedited appellate review with the Supreme Judicial Court. Once again the Hingham Planning Board opposed this effort. Over that opposition, the Supreme Judicial Court scheduled oral arguments in the case for immediately following the court’s summer recess, in early September 2002, less than one year after the Planning Board’s lawsuit first entered the court system. Thus, the developer and the ZBA minimized the damage done by the Planning Board’s “delay equals denial” strategy. Then they urged the Supreme Judicial Court to outlaw that strategy in future cases.

The SJC’s holding

At the Supreme Judicial Court, Hingham Campus and the Hingham ZBA argued that appeals by town officials like the members of the Hingham Planning Board are unauthorized by the plain “person aggrieved” language of Chapter 40B. A town board is neither a “person,” because the state and its subdivisions are not “persons,” nor “aggrieved,” because it is not seeking to vindicate private rights or interests. More fundamentally, the developer and ZBA argued, the legislature deliberately relegated planning boards, and all town officials other than the ZBA, to an advisory role in the comprehensive permit process precisely to deprive them of the ability, too often exercised in pre-Chapter 40B days, to drag out approval processes for affordable housing until the development becomes uneconomic and the developer gives up. A town body statutorily deprived of all decision-making authority at the local level should not be allowed to sidestep the limited advisory role designated for it by the legislature and attempt to use the courts to impose its will on the developer. Hingham Campus and the ZBA argued that the court should deny Chapter 40B standing to town officials in order to finally end the tactics of municipal delay and obstruction that Chapter

40B was designed to eliminate.

Rather than meet this argument head-on, the Planning Board argued that the document issued by the ZBA simply was not a comprehensive permit, because the underlying housing was not affordable. The Planning Board argued in essence for a limited exemption to the statutory limitation on municipal standing that would allow town bodies to appeal comprehensive permits if the Department of Housing and Community Development had determined that a development will not qualify as affordable — an argument weakened by the fact that, before oral argument in the Supreme Judicial Court, DHCD had written a letter approving the affordability provisions in the comprehensive permit and praising the Hingham Campus proposal as “a unique opportunity to take an innovative approach to affordable housing.”

In January the Supreme Judicial Court announced that it agreed with Hingham Campus and the Hingham ZBA, holding quite simply that Chapter 40B “does not provide a mechanism for a municipal board to appeal from the granting of a [comprehensive] permit.” *Hingham Campus*, 438 Mass. at 370. In light of its ruling that the Planning Board was not entitled to be in court in the first place, the SJC declined to reach the merits of the Planning Board’s perceived problems with the proposal, be they the affordability mechanism or the height of the buildings.

Hingham Campus may not be the last such battle. In another of the authors’ comprehensive permit cases, for instance, the town plaintiffs have responded to a *Hingham Campus*-based motion to dismiss by arguing that it remains an open question whether the town itself, as opposed to its boards, has standing — and, by the way, this town has now decided that it filed its appeal to vindicate its private rights as an abutter to the proposed development, even though its Rule 30(b)(6) witness disclaimed any such basis for the appeal just *before Hingham Campus* was decided. Presumably such arguments, creative as they may be, will fall before the idea at the heart of *Hingham Campus* that Chapter 40B entitles an affordable housing developer to a yes or no decision from *one* municipal board, and a speedy process both during and *after* the local proceedings.