

## Land use bar hails SJC ruling on 40B

*Housing Appeals Committee can strike conditions to affordable housing projects*

■ Eric T. Berkman

Lawyers say a recent Supreme Judicial Court decision affirming the Housing Appeals Committee's jurisdiction to review conditions imposed on an affordable housing project considered "uneconomic" even without those conditions should provide more certainty for developers in undertaking such projects.

The developer in the case, defendant HD/MW Randolph Avenue, proposed a 90-unit housing development in Milton with 23 affordable units. Funding commitments from a public subsidizing agency made the project economically feasible to the developer.

Milton's Zoning Board of Appeals, the plaintiff in the case, granted a comprehensive permit for the project, but only for 35 units and subject to 60 additional conditions. HAC struck the conditions on appeal, finding that they made the project — already "uneconomic" according to metrics established in state regulatory guidelines — "significantly more uneconomic."

The SJC affirmed, rejecting the zoning board's argument that HAC, which is authorized by statute to strike or modify conditions that would render a Chapter 40B affordable housing project "uneconomic," had no power to address conditions imposed on projects that were already uneconomic to begin with.

"When public agencies are prepared to fund a project, and developers are prepared to proceed with less return on their investment from the outset than set forth in HAC's guidelines, HAC is authorized to eliminate conditions that effectively prevent such projects by rendering them significantly more uneconomic," Justice Scott L. Kafker wrote for the court.

Andrew E. Goloboy of Beverly, who represented the developer, said the decision should provide comfort to



THE HOLLAND COMPANIES H & W APARTMENTS MILTON, MASSACHUSETTS SPENCER ARCHITECTS

A rendering of the proposed 90-unit housing development in Milton

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ANDREW E. GOLOBOY

those undertaking the risk of affordable housing projects.

"It would have deterred projects in the first place because it's unknowable what the economic threshold [according to the guidelines] will be until years later," Goloboy said, explaining that the calculation is first performed during the pre-hearing process before HAC, long after the project has been proposed. "Now there's no fear of appealing conditions to HAC, going through the pre-hearing process, having the calculation performed, and being told at that point, 'Unfortunately you're below this threshold and we have no

jurisdiction, so the board's decision cannot be reviewed.'"

Ellen W. Freyman, a land use lawyer in Springfield, called it a "logical conclusion" that less profitable projects should still benefit from Chapter 40B.

"Given the volatile economic environment, developers willing to proceed on that basis and provide much-needed affordable housing shouldn't be deterred from doing so by roadblocks imposed by municipalities," she said.

Milton's attorney, M. Patrick Moore Jr. of Boston, could not be reached for comment prior to deadline.

The 21-page decision is *Zoning*

*Board of Appeals of Milton v. HD/MW Randolph Avenue, LLC, et al.*, Lawyers Weekly No. 10-086-22.

## 'SIGNIFICANTLY MORE UNECONOMIC'

Under 40B, if a local zoning board of appeals denies an application for a comprehensive permit to build affordable housing or imposes conditions that make the project uneconomic, the developer may appeal to HAC.

HAC may then strike or modify conditions that are not "consistent with local needs" so as to make the proposal no longer uneconomic.

Chapter 40B defines as "uneconomic" a situation in which the developer does not realize a reasonable rate of return as calculated under guidelines promulgated by the Department of Housing and Continuity Development.

In 2014, HD/MW, the developer in the case, secured a project eligibility letter from MassHousing, a quasi-public agency that subsidizes affordable housing developments, for a proposed two-building, 90-unit residential development in Milton that would feature 23 affordable units.

To secure the letter, which is required for a comprehensive permit under Chapter 40B, HD/MW had to show MassHousing that the project was "financially feasible" within the particular housing market.

In July 2014, Milton's ZBA granted a comprehensive permit that cut the development to 35 units and subjected it to 60 conditions, including the requirement of a looped road through the project that would apparently necessitate a radical redesign.

HD/MW appealed to HAC, with three years of litigation ensuing.

In December 2018, some four years after the developer applied for its permit, HAC issued a decision in which the project as originally proposed was determined to be "uneconomic" under the guidelines.

Specifically, the project was calculated as having a projected 5.88 percent return on total cost, which fell below the guidelines' minimum threshold of a 6.84 percent rate for a project of that type to be considered economic.

Meanwhile, the ZBA's conditions were calculated as reducing the expected rate of return by more than 27 percent.

Accordingly, HAC ruled in its deci-

sion that the conditions made the project "significantly more uneconomic" than proposed and ordered many of the conditions struck or modified.

A Land Court judge affirmed HAC's decision, and the SJC granted the ZBA's subsequent application for direct appellate review.

## BOARD DISCRETION

The SJC found that, contrary to the ZBA's arguments, HAC had jurisdiction to consider and eliminate conditions that rendered already uneconomic projects significantly more uneconomic.

"[S]uch action fulfills the statutory purpose of preventing municipalities from hampering the construction of low-income housing," Kafker said.

The court also rejected the ZBA's argument that HAC exceeded its statutory authority by devising the "significantly more uneconomic" test and applying it to cases in which developers are willing to proceed despite initial rates of return that fall below the guidelines' minimum rate.

"This adjudicative interpretation fills in a gap in the statutory and regulatory regime, and absent a clear directive from the Legislature to the contrary, regulatory agencies are entitled to fill such gaps," Kafker said.

The SJC was similarly unpersuaded that the "significantly more uneconomic" standard was so vague as to be arbitrary.

"[T]here is nothing inherently improper with the standard's use of the term 'significantly,'" Kafker wrote. "The act does not forbid its use, and courts and fact finders routinely apply standards phrased in the same or similar terms."

## EXTRAORDINARY DEFERENCE?

Jason R. Talerma of Millis, who represents municipalities in land use cases, called the decision "yet another example of extraordinary deference" to a statutory scheme "riddled with ambiguity and illogic."

Specifically, he said, the courts are endorsing a process in which the standards are so divorced from actual practice that projects deemed economically infeasible are still being approved.

"Either the standards of review are mere artifice and the projects are not actually uneconomic, or, worse still, we are engaged in the process of approving vital affordable housing proj-

## Zoning Board of Appeals of Milton v. HD/MW Randolph Avenue, LLC, et al.

**THE ISSUE:** Did the Housing Appeals Committee have jurisdiction to strike conditions imposed by a permitting authority that rendered an already "uneconomic" affordable housing project "significantly more uneconomic?"

**DECISION:** Yes (Supreme Judicial Court)

**LAWYERS:** M. Patrick Moore Jr. of Hemenway & Barnes, Boston (Zoning Board of) Appeals. Andrew E. Goloboy of Beverly (developer)

ects that are on the brink of failure, which is just plain bad policy," Talerma said. "The statute remains a valuable tool for fostering affordable housing but, as interpreted by the courts, leaves towns with precious few tools to combat poorly conceived projects."

Other attorneys, however, said the decision takes a sensible approach to an issue that arises frequently but is not directly addressed by statute.

"It's not uncommon for a developer to propose a project for which the return on total cost falls below DHCD guidelines that define a 'reasonable return,'" said Donald R. Pinto Jr. of Boston. "One of my recent clients is a nonprofit that builds 100-percent affordable projects, and their starting ROTC, before the local zoning board imposes conditions, is razor thin — often below 1 percent."

Yet, while HAC has applied the "significantly more uneconomic" test to such projects for more than a decade, zoning boards continue to challenge it, Pinto continued. "The SJC [held] that HAC had ample authority to create this test to fill a critical gap in the statutory and regulatory regime, [and] this decision should streamline Chapter 40B litigation by taking one potentially contested issue off the table."

Nicholas P. Shapiro of Boston, who co-chairs the Real Estate Bar Association's Land Use and Zoning Section, said it is risky enough already for developers to take on affordable housing projects with subsidies since the subsidies themselves have strings attached or are subject to ongoing appropriations.

"Do we really want a world where developers who are willing to take on that risk and build 40B complexes won't get the regulatory benefits of Chapter 40B?" he said. "It's like no good deed goes unpunished. You're taking on more risk, and you're not going to get the regulatory benefit of the statute as a result? That's absurdist from a policy perspective."