



BOOTHROYD V. AMHERST,
OR, THE RUNAWAY ZONING BOARD¹

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M.G.L. c. 40B provides developers with relief from exclusionary local zoning bylaws and practices which might inhibit the construction of low and moderate income housing. While a denial of a so-called “comprehensive permit” will be upheld by the Housing Appeals Committee (“HAC”) when the denial is “reasonable and consistent with local needs,” the statute creates a presumption that if less than 10% of the community’s total housing is “affordable” to families with incomes below 80% of the region’s median income, there is a need for affordable housing which outweighs local zoning and planning concerns.

As the majority of Massachusetts communities fall short of this 10% goal, the role of a local zoning board of a community with greater than 10% affordable housing has rarely been addressed by a Massachusetts court. In Boothroyd v. Zoning Board of Amherst (Land Court Misc. Case Nos. 278308, 279352, August 14, 2003) Judge Alexander H. Sands III recently affirmed the broad power of a local zoning board to override a

town bylaw and issue a comprehensive permit even though the community has met the 10% threshold.

In the Boothroyd case, the Amherst ZBA granted a comprehensive permit allowing the development of 27 apartments in a district zoned for single-family homes. It was acknowledged that the town had more than 10% affordable housing within the meaning of the statute. Abutting landowners appealed to the Land Court, and all parties moved for summary judgment on the legal issue of whether a local ZBA can bypass a zoning bylaw and issue a comprehensive permit once the 10% minimum threshold for affordable housing in a city or town has been met.

Ch. 40B provides for comprehensive permits when local requirements and regulations (such as zoning bylaws), which might on their face prohibit the project, are inconsistent with local needs. M.G.L. c. 40B, §20 provides that:

Requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to

protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning

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ing appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest federal decennial census of the city or town...or (2) the on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year....

Neighbors argued that the clause “when imposed by a board of zoning appeals” creates only a temporal qualification in the application of the zoning bylaws, which are automatically applied once a city or town meets the 10% minimum standard, and does not imply that there is a decision-making process involved.

Judge Sands agreed with the town, however, which argued that “when

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imposed by a board of zoning appeals” means the same as “if imposed by a board of zoning appeals” thereby allowing the local board discretion in its application of local by-laws.

In allowing a ZBA’s discretion even after a municipality meets the 10% minimum standard Judge Sands followed the intent of the statute as outlined extensively by the SJC in Board of Appeals of Hanover v. HAC.² The Court concluded that the legislature’s intent in passing 40B was to provide relief from exclusionary zoning practices which prevented the construction of badly needed low and moderate income housing.³

Our construction...does not mean that the board must automatically grant comprehensive permits in all cases where the community has not met its minimum housing obligation as it is specifically defined in §20. The statute merely prevents the board from relying on local requirements or regulations, including applicable zoning bylaws and ordinances which prevent the use of the site for low and moderate income housing, as the reason for the board’s denial of the permit or its grant with uneconomic conditions....

However, once the municipality has satisfied its minimum housing obligation, the statute deems local ‘requirements and regulations,’ including its restrictive zoning ordinance or bylaws, as ‘consistent with local needs’ and thereby enforceable by the board if it wants to apply them. (emphasis supplied in original). In this situation, only the board retains the power to

override these requirements and regulations in order to grant a comprehensive permit. (emphasis added). This result reflects the Legislature’s desire to preserve local autonomy once the community has satisfied its minimum obligation.⁴

In other words, even after a municipality has met its minimum housing requirements, the local board retains authority to override restrictive zoning ordinances. The HAC has no authority to order a board to issue a comprehensive permit once the 10% level is met, but a board is within its discretion to issue one.

While the Land Court has upheld this authority, presumably there is a point where the local requirements and regulations outweigh the perceived need for affordable housing. (This is an issue not addressed by Judge Sands.) Any person aggrieved by the issuance of a comprehensive permit may appeal to either the Land Court or Superior Court.⁵ At issue would be whether or not the local ZBA abused its discretion in finding that the zoning bylaws were inconsistent with the need for additional (i.e., beyond 10%) affordable housing. One gauge the ZBA might use to determine the local need for affordable housing is the percentage of residents who earn less than 80% of the median income for the region. If this percentage is greater than the 10% minimum, additional housing is reasonably necessary.

Chapter 40B, the so-called Anti-snob Zoning Law, is already a contentious issue among developers and residents. If, or more likely when, Boothroyd is appealed, the Court

would be wise to set forth guidelines for a local board to use to evaluate local needs for affordable housing. Otherwise, opponents of the law will raise the specter of “runaway zoning boards of appeal” – small groups of individuals who can disregard the will of the people. Zoning boards should instead have strong guidance from the courts, and set forth a strong and clear rationale themselves, when they set aside local bylaws to issues a comprehensive permit.

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1. With apologies to John Grisham.
 2. 363 Mass. 339, 294 N.E.2d 393 (1973).
 3. Id. at 353-54, 294 N.E.2d at 406.
 4. Id. at 366-367, 294 N.E.2d at 413-14.
 5. M.G.L. c. 40B §21, c. 40A §17.