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The Bowditch & Dewey Real Estate Blog

Massachusetts Court Upholds Vital Affordable Housing Principle

BY PAUL BAUER AND MARISA PIZZI • OCTOBER 1, 2015

High housing costs limit our region's [economic growth](#). Since being enacted in 1969, the Comprehensive Permit Law under Massachusetts General Laws Chapter 40B has championed affordable housing by creating a one stop permitting process for affordable housing projects and in some instances providing a rebuttable presumption that such housing is consistent with local needs and thereby permitting an override of local zoning limitations.

In its September 25, 2015 Order, the Massachusetts Appeals Court in [Town of Brookline v. MassDevelopment Finance Agency](#) upheld a primary principle of Chapter 40B: that a consolidated permitting process is vital to support the creation of affordable housing in the Commonwealth.

Under Chapter 40B, developers of affordable housing proceed through a comprehensive permitting process that is designed to minimize the number of local permits needed for a project. Prior to submitting an application to a zoning board for a comprehensive permit, the developer must obtain a Project Eligibility letter from an appropriate State agency to establish site control and funding eligibility. Cases have long held that a party could not contest the issuance of that Project Eligibility letter in court until the comprehensive permit was issued or denied. In 2008, however, the State revised the [Comprehensive Permit regulations](#) and in doing so provided greater detail as to how agencies should determine whether or not to issue the Project Eligibility letter.

In [Town of Brookline v. MassDevelopment Finance Agency](#), the Town of Brookline and others argued that this "expanded" process for determining project eligibility increased the importance of the Project Eligibility letter and therefore required judicial review upon issuance. Bowditch & Dewey, LLP (through these authors and our former colleague Mary Pat Cormier) filed an *amicus curiae* brief on behalf of the Greater Boston Real Estate Board and the Citizens' Housing and Planning Association opposing the Town's position, and in support of the developer and existing law.

Fortunately, the Appeals Court saw that review of the Project Eligibility letter would confound the goals of Chapter 40B by miring the process in multiple judicial reviews and ruled in favor of the developer and existing law. The Court

concluded that “if and to the extent that the factual conclusions encompassed by a project eligibility letter under the new regulations warrant judicial review, such review may be obtained incident to review of any permit that subsequently may be issued.” Maintaining the integrity of the comprehensive permitting process is an important victory in minimizing the hurdles faced in developing affordable housing.