

**June 10, 2008**

### **SJC Rebuffs Housing Appeals Committee in Landmark Ruling**

The state's highest court just issued a landmark ruling under Chapter 40B, reigning in the authority of the Housing Appeals Committee and the Department of Housing and Community Development to strike conditions imposed by local zoning boards on comprehensive permits. The case concerned a 640-unit apartment project in Woburn, approved by the Woburn ZBA in 2001 with 50 conditions, the most significant of which was to reduce the density to 300 units. The developer, Archstone-Smith, appealed to the HAC, but failed to meet its statutory burden of proving that the conditions rendered the project "uneconomic." According to the Court, the HAC's inquiry "should have ended there." Instead, the HAC proceeded to evaluate the merits of the conditions, as if the developer had not met its initial evidentiary burden, ultimately modifying the Board's density restriction to 420 units. On appeal the HAC argued that it had authority to treat an approval of a comprehensive permit as a denial, under certain circumstances, thereby justifying the modification of conditions in the absence of an "uneconomic" argument. The Supreme Judicial Court expressly rejected this assumption of regulatory authority, holding that where a zoning board approves a comprehensive permit, the HAC is powerless to remove or modify conditions unless and until the developer proves that the conditions render the project "uneconomic."

Today's decision will have the effect of nullifying one of DHCD's new regulations, authorizing the HAC to convert approvals into "de facto" denials. It could also cause several previously-issued HAC cases to be re-opened, where the HAC had exercised this assumed authority. As with many of the SJC's recent rulings, the footnotes are as important as the text. In Footnote 24, the SJC recognized that the practice of reducing the density of 40B projects through permit conditions could thwart the overriding statutory objective of expediting the construction of affordable housing. It suggested, however, that this problem should be addressed by regulation (defining the statutory term "reasonable return"), to provide objective criteria by which to evaluate the economic affect of conditions. I anticipate that DHCD will take the SJC up on this suggestion over the next few months.