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Ch. 40B and Zoning Law Round-Up

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DHCD MODIFIES CH. 40B GUIDELINES

Burden of Proof Shifts From Developer to Zoning Board on Statutory "Uneconomic" Test

In an apparent response to the Supreme Judicial Court's June 10th ruling in Woburn v. Housing Appeals Committee, 451 Mass. 851, the Department of Housing and Community Development has amended its "Chapter 40B Guidelines" by adding a provision shifting an important evidentiary burden under the statute. Under the new provision (Page I-4), a zoning board condition that decreases the number of housing units in a project by a factor of more than 5% is now presumed to render the project "uneconomic." The effect is to place the burden on the zoning board to prove that its density-reducing condition is *not uneconomic*. This represents a significant shift in the law; historically, the *developer* bore the burden of proving the uneconomic effect of permit conditions.

This new burden-shifting "guideline" appears to conflict directly with the Woburn decision, in which the SJC, citing the statute, held that "demonstrating that the conditions render the project uneconomic is, therefore, a necessary element of the developer's prima facie case for relief." The SJC also suggested that DHCD could promulgate *regulations* to better define the standards by which the "uneconomic" test should be judged, but it did not suggest that a policy change could be effectuated through a *guideline* change or that DHCD even has the regulatory authority to modify evidentiary burdens. Guidelines are adopted and amended at the whim of an agency, and are not subject to the same level of scrutiny and public participation as the adoption of regulations. The provision also seems to directly conflict with a DHCD regulation that expressly states: "In the case of an approval with conditions, the Applicant shall have the burden of proving that the conditions make the building or operation of the project uneconomic." 760 CMR 56.07(2)(a)(3). Such conflicts make these Guidelines ripe for a judicial challenge.

SJC AFFIRMS FLOOR-TO-AREA RATIOS AS LEGITIMATE EXERCISE OF ZONING POWER

A couple of weeks ago, the SJC upheld the use of "floor-to-area ratio" dimensional restrictions as a legitimate use of a town's zoning power under the Zoning Act, G.L. c. 40A, s. 3. 81 Spooner Road, LLC v. Town of Brookline (SJC No. 10104). Floor-to-area ratios are commonly employed means of regulating the *intensity* of the use, and the *bulk* of structures, on a given lot.