3 MINUTES ON PERMITS

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BULLETINS:

NEW CLINICS NEED PRESCRIPTION TO CURE ZONING ILLS

In February, Massachusetts became the next state to authorize the practice of limited medical services in retail pharmacies. However, these new facilities may need a prescription of their own to cure land use regulations in some municipalities that may block them from operating.

As in other states, opening clinics offering convenient access to health care seems like a natural outgrowth for retail pharmacies that already offer "one stop shopping" for consumers on a broad range of household items. Locally, the services in these clinics will be offered in what newly published regulations from the Massachusetts Department of Public Health ("DPH"), set forth at 105 CMR 140.100, are calling Limited Service Clinics or LSCs. Under the powers granted to it by statute, DPH promulgated the regulations in a thoughtful manner, inclusive of many public comments offered during the G.L. c. 30A process for developing such regulations. Many retail pharmacies plan on using a part of their present facilities to operate on site LSCs under the regulations.

The regulations require each LSC to obtain a license. As part of the licensee's application, the licensee must meet certain physical plant requirements spelled out in 105 CMR 140.200, among a number of other regulatory requirements ranging from in-store advertising, access to interpreter services, the size of exam rooms, and the placement of janitor closets. Securing a use and occupancy certificate of inspection or a "CI" for an LSC is another license requirement. However, even if a licensee complies with all the DPH regulations, it will not be able to obtain a CI to operate a new facility or even a building permit to perform a build out of one. A building official reviewing a permit application for an LSC in a retail pharmacy will be required to perform a zoning compliance review as part of the application process. In municipalities with zoning regulations that make "clinic" and "retail" incompatible uses on the same property, the building permit application must be denied. The applicant will be required to obtain relief from the local zoning board of appeal. Further, LSCs are a "new" use to local officials who must determine how to apply local zoning regulations to this newly created use item not considered under existing zoning.

Boston, for example, has zoning regulations applicable to downtown and neighborhood zoning districts that do not allow for the union of an LSC and a retail pharmacy on the same property "as of right". An LSC most likely would be treated as a clinic use item because a clinic, as defined by Articles 2 and 2A of the Boston Zoning Code ("BZC"), is a "place for medical or similar treatment and examination of persons as outpatients." Many chain retail pharmacies familiar to consumers occupy their various locations as "local retail business" uses, as defined by Articles 2 and 2A, and subject to the table of uses applicable to each zoning district. The zoning districts and sub-districts that provide for a "local retail business" use as an "allowed" use also designate a "clinic" use as either a "conditional or a "forbidden" use. These incompatible zoning use designations will require any retail pharmacy seeking a building permit to build out and operate an LSC to seek relief from the zoning board of appeal .

Adding an LSC only as an "accessory use", subject to the regulations of BZC Article 10, and various conditions in the table of uses in zoning districts, would also fail. An accessory use is a use incidental to a lawful main use. Under the current zoning, a "clinic" is not "customarily incidental to" a retail use—at least not until now—and therefore, could not

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NEW CLINICS NEED PRESCRIPTION TO CURE ZONING ILLS (continued)

meet the definition for an accessory use. In some neighborhood zoning districts in Boston, a clinic use may be a proper accessory use or a sub-use to some institutional uses such as hospitals and colleges and universities. While there are exceptions that may provide for a more liberal union of non-compatible uses such as clinics and retail, for example, in certain urban renewal or economic development districts, these limited exceptions will not provide the blanket exemption needed for Massachusetts to realize the full benefit and intent of bringing these services to the Commonwealth. Opponents of these facilities may also seize upon this zoning issue to further prevent their forward progress here.

Retail pharmacy chains seeking to open LSCs in Massachusetts may limit their plans to municipalities with zoning regulations 'friendly' to their operations. However, if business planning seeks market penetration in municipalities with zoning regulations that are in conflict with expansion plans, then proponents of LSCs should consider undertaking a concentrated effort with local elected and planning officials.

Cooperating with local elected and planning officials to amend local zoning codes now may be the most efficient means for the pharmacy community to address this issue head on rather than attempting to obtain piecemeal variances from project to project. Conceivably, one solution may be working to create a new accessory use for retail pharmacies where LCSs were not in existence when many local and land use requirements and definitions were created.

: *HOUSING BOND BILL SEEKS 'PREVAILING WAGE'*

A proposed amendment to a new housing bond bill now pending in the state legislature could substantially drive up the cost of producing affordable housing in Massachusetts. The bill authorizes an additional $1 billion in bonds to support development of affordable housing. The proposed amendment would require developers to pay a 'prevailing wage' to construction workers on all projects having over 75 units or development costs over $25 million.

The prevailing wage is set by the state department of labor and is a minimum hourly rate for union workers that could exceed the hourly rates paid to non union construction workers doing the same job. Generally, the cost of utilizing prevailing wage workers on affordable housing projects exceeds the cost of utilizing non-prevailing wage workers doing the same jobs by 34%. The bill has passed both Houses of the state legislature. If passed the amendment could have implications for the 2,786 units of affordable housing presently in the state pipeline.

: *NEW STATEWIDE BUILDING CODE EXPECTED IN 2008*

. The state board of building regulations and standards has adopted the 7th edition of the Massachusetts State Building Code, 780 CMR to replace the existing 6th edition. The new building code is based on the 2003 edition of the International Building Code (the "IBC"). The new code will take effect when it is officially published by Secretary of State William F. Galvin which is expected to occur no later than December 1, 2008 although many expect publication of the new code on or before June 1, 2008.

Once the new code is officially published, there will be a six month period during which applicants for building permits can choose to design their projects under either the old 6th edition or the new 7th edition. As long as the building permits are issued prior to the expiration of the six month period, projects designed totally under the old 6th edition are permitted. After the sixth month period ends on either December 1, 2008 or May 1, 2009, only projects designed under the new 7th edition will be permitted.

: *NEW TIDELANDS LEGISLATION SIGNED*

Governor Deval Patrick has signed legislation that retroactively restored the G.L. c. 91 regulatory licensing exemptions that were stricken down by the Massachusetts Supreme Judicial Court in the February 2007 decision in **Moot v. The Department of Environmental Protection.** ***The exemptions, which had existed since 1990, were stricken because the Court found that the department had lacked the express legislative authority it needed to grant them in the first place. Besides retroactively validating the licensing exemptions the department had already granted, the legislation Governor Patrick signed also exempts new fill, uses and structures proposed on landlocked tidelands from the licensing requirements and brings the legislative definitions of landlocked tidelands into line with the 1990 regulatory definitions that were challenged in the*** **Moot** ***case.***

The legislation also authorizes new public review requirements for tidelands and landlocked tidelands uses for proposed projects that fall under the department's jurisdiction.

LIMITS PUT ON STUDENT TENANTS BUT NEW REGULATIONS MAY FAIL

The Boston Zoning Code's new definitions regulating the number of unrelated college students who can live in one unit and the litigation which was filed to contest its constitutionality are the next chapter in Boston's long history of student rental occupancy issues. This legislation attempts to address quality of life issues related to students living off-campus in private rental dwellings which are not owned or maintained by a local college. Building owners and managers must follow this issue carefully to avoid running afoul of enforcement efforts. But the real issue here is not the litigation or the new amendments it challenges. Instead, the real issue is the long history of difficulty with crafting a government enforcement tool that can fairly and effectively regulate quality of life issues in city neighborhoods having diverse tenant markets without intruding upon the fundamental right of a family to choose which family members shall share a common household. This issue will not die with this litigation or amendment and for this reason rental property owners must stay current with it.

How The Zoning Code Is Changed. Attempts to enforce pretext amendment definitions of "lodging house" and "family" against dwellings occupied by college students, revealed definitional gaps in both the Boston Zoning Code and the state lodging house statute, G.L. c. 140 §22 that frustrated the City's enforcement of such dwellings as illegal lodging houses and issuing abatement orders to reduce the number of occupants.

The new zoning amendments attempt to close the definitional gaps and pay particular focus to college students who many residents believe cause nuisance and multiple disruptions by living off campus in city neighborhoods. The new amendments provide that a dwelling now occupied by five or more "full-time enrolled undergraduate students" or other individuals not related by "blood, marriage, adoption or other analogous family union", can be treated as an illegal lodging arrangement that is susceptible to enforcement proceedings.

New Challenges, New Frustrations. The newly amended zoning definitions expressly define a "family" as not to include five or more college students living in one dwelling unit. As for the litigation to invalidate that definition, students are not a protected class, and therefore the City of Boston will only be required to show that it had a rational basis for adopting the regulations to achieve a legitimate government purpose. Anyone who has lived next to a house full of college student renters, can attest to what that legitimate government purpose might be. However, the City of Boston must be able to show that it had a rational basis for singling out college students for stronger regulation in this manner more so than other categories of tenants. To prevail on this rational basis test, the City of Boston must be able to show that college students, for example, cause more trash, noise, parking and other nuisance issues than similarly situated tenant categories such as recent graduates, graduate students or other tenants who are not related. The inability to make such a showing will preclude the City from maintaining that it had a rational basis for singling out college students for enforcement—if, so, the ordinance will be invalidated by the Court as unconstitutional.

Conceivably the new definitions could pose as many obstacles to enforcement as they are intended to obviate. For example, the new definitions require that occupants "not have equal rights" to the entire dwelling and that the occupants not be living together as a "single non-profit housekeeping unit." Because legal principles provide that all signatories to a lease are legally entitled to use the entire leasehold estate, five or more unrelated occupants, even college students, who have all signed the lease could still escape enforcement as an illegal lodging house under the new definitions. Where the new definitions will lead is unknown. In essence, the difficulties evolve around the attempts to define the term family without offending constitutionally protected rights while still creating legislation that is effective to curb quality of life problems caused by overcrowded dwellings. Property owners should monitor the situation carefully in the months ahead.

: *NEW STORMWATER REGULATIONS PROMULGATED*

The Massachusetts Department of Environmental Protection has recently promulgated new regulations effecting storm water management. The regulations are effective for all projects submitted for review on and after January 2, 2008. The new regulations which mostly officially memorialize existing departmental storm water policies, also contain new provisions which clarify several formerly murky aspects of storm water management maintenance. For example, the new regulations clearly establish that storm water management facilities created after the adoption date are not subject to protection as wetland resource areas. The ability of storm water managers to maintain existing storm water facilities is also clarified in the new regulations.

A revised Storm Water handbook Vol. 2 is being published by the Department.

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Please contact us about any questions you may have about any permitting, construction, zoning or litigation issues. With more than twenty years of practice and an intimate knowledge of legal and local issues involving real estate development in Massachusetts, we stand ready and able to achieve your objectives. Our record speaks for itself. *(Bourne et al. v. State Building Code Appeals Board et al.)*

Success Achieved in Superior Court for Developer-Client ("Kendrick"): A State Building Code Board of Appeals decision was appealed to Superior Court by a group of abutters to Kendrick's residential project. Kendrick's request for certain variances from the State Building Code had previously been denied by the City of Boston. However, with our representation and experience, Kendrick succeeded in both the State Board and Superior Court after two administrative hearings and several court sessions despite vigorous opposition from both abutters and local City officials.

COURTS CREATE 'DEVELOPER FRIENDLY' MARKET FOR G.L. C. 40B PROJECTS

Developers looking for new opportunities in a declining market environment may want to consider the "developer friendly" environment that recent decisions from the state's highest court seem to create for projects contemplated by the affordable housing component of the state's regional planning statute or G.L. c. 40B. The statute was enacted to promote development of affordable housing in Massachusetts and contains a number of developer friendly components for low to moderate income affordable housing projects. Several decisions from the state's Supreme Judicial Court during the past year have supported the development of such projects.

First, in *Boothroyd v. ZBA Amherst*, the Court recognized the Town of Amherst's authority to issue a comprehensive permit under G.L. C. 40B where the ZBA based its decision on balancing the "regional need" for affordable housing against the local need for retaining zoning controls. The Court held that, despite Amherst satisfying the statutory definitional requirements for its regulations to be "consistent with local needs", the ZBA was not barred from exceeding those obligations in approving a permit based upon a "regional need" for affordable housing. Soon thereafter, the state Appeals Court added further support for G.L. c. 40B development projects in holding that the Town of Wrentham, merely by meeting the 10% housing unit requirement, did not have the authority to reject a comprehensive permit application in a public hearing. The Appeals Court in *Town of Wrentham v. Housing Appeals Committee*, established that crossing the statutory 10% threshold for affordable housing units is only a presumption, and is not dispositive of the fact that local regulations are "consistent with local needs". A full review of a comprehensive permit application is required to determine that fact.

Funding for projects under G.L. c. 40B also received support from the decision in *Town of Middleborough v. Housing Appeals Committee*. The court in *Middleborough* upheld a proposed project as "subsidized by the state or federal government" because it received funding through the New England Home Fund of the Federal Home Loan Bank of Boston. For the purposes of the statute, the court reasoned that funding provided by FHLBB satisfied the statutory requirement that a project must be "subsidized by the state or federal government" to be eligible to receive a comprehensive permit under G.L. c. 40B.

With a slowing real estate market, developers may want to consider opportunities under G.L. c. 40B, given the apparent "developer friendly" climate created by the courts.